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Khairul Azwan bin Harun v Mohd Rafizi bin Ramli

B HIGH COURT (KUALA LUMPUR) — SUIT NO 23NCVC-55–07 OF 2015
S NANTHA BALAN J
20 OCTOBER 2016

C *Evidence — Witness — Failure to call — Whether failure to call Australian solicitor and Australian journalist should result in adverse inference being drawn against defendant*

D *Tort — Defamation — Defences — Justification — Impugned words contained in press release by defendant — Whether impugned words bear a defamatory meaning — Whether alternative lesser meaning more reasonable in circumstances of present case — Whether defendant proven on balance of probabilities that there were grounds for investigation to be carried out and for*
E *plaintiff to give explanation on matter — Fair comment — Whether defendant could rely on defence of fair comment — Whether impugned words would constitute statement of fact — Whether defendant actuated by malice — Whether defendant acted reckless to the truth*

F The plaintiff was at all material times the Deputy Youth Chief of the United Malaysia National Organisation ('UMNO') and supreme council member of UMNO, while the defendant, a qualified chartered accountant, was at all material times a member of Parti Keadilan Rakyat ('PKR') and the Member of Parliament for the constituency of Pandan in Kuala Lumpur. The defendant
G had made several press releases and published information, which revealed that the Majlis Amanah Rakyat ('MARA') had, through its subsidiary purchased properties at hyper-inflated prices and that some part of the purchase monies was subsequently channeled back to various parties within or connected to MARA. The plaintiff claimed that at a press conference held on 6 July 2015,
H the defendant had issued a press release entitled 'Individu Terbabit Di Dalam Urusniaga MARA Perlu Tampil Memberi Penjelasan' ('the press release') that suggested that the plaintiff and certain other members of UMNO Youth Exco were directly involved with and therefore implicated in the MARA property purchase scandal. In the press release the defendant sought to highlight four
I transactions for the purchase of four properties in Australia at marked-up prices or prices above the market value of the said properties by a wholly owned subsidiary of MARA. According to the defendant, the transactions had been carried out via a complicated corporate structure consisting of several layers of foreign and offshore companies instead of MARA directly entering into the

property transactions and this had resulted in MARA having overpaid RM129m for the purchase of the Australian properties ('the MARA property purchase scandal'). According to the plaintiff, the press release, which was subsequently published in the online media, had defamed him. As the plaintiff's name had been mentioned in the press release, the plaintiff alleged that his reputation had been maligned because the offending words had conveyed the meaning that he was directly involved with and therefore implicated in the property transactions. The plaintiff thus filed the present suit for defamation against the defendant. It was the plaintiff's case that although he had nothing to do with the MARA property purchase scandal, the words used in the press release ('the impugned words') had lowered him in the estimation of right thinking members of society. The plaintiff pleaded that the impugned words could be understood to mean, inter alia, that he was a dishonest and corrupt person, who had acted for his own pecuniary interest and had misused his position as the Deputy Youth Chief of UMNO and of being involved in the MARA property purchase scandal. In his defence the defendant denied that the words complained of were defamatory of the plaintiff. Instead the defendant sought to justify the impugned words on the basis of a lesser meaning or what was now understood as a *Chase* level 3 meaning as derived from the case of *Chase v Newsgroup Newspapers Ltd* [2002] EWCA Civ 1772 ('*Chase*'s case'). The defendant claimed that the alternative meaning was more reasonable in the circumstances of the present case. The defendant also relied on the defence of fair comment by submitting that the facts relating to the MARA property purchase scandal, which were the subject matter of the press release, were true and in respect of a matter of public interest.

Held, dismissing claim with costs of RM73,000:

(1) As may be gleaned from the various case authorities referred to by the parties, the guiding principles for the determination of the meaning to be ascribed to the impugned words were, inter alia, an interpretation that was reasonable and not strained or perverse or utterly unreasonable. Following the *Chase*'s case it was now settled that the impugned words could be capable of 3 levels of meaning. In the present case, the impugned words were contained in six paragraphs and most of these paragraphs had either been proven to be true or admitted to being true by the plaintiff, except for the fourth paragraph. However, the fourth paragraph did not stand on its own but formed part of a narrative where in the following fifth paragraph, the defendant had implored that an investigation be carried out on those who were involved in the property transactions. In the circumstances the fourth paragraph could not bear the defamatory meaning that the plaintiff was, inter alia, guilty of corruption or abuse of power, as contended by the plaintiff, as this would be to place a wholly strained and unreasonable interpretation to the impugned words.

Instead, the impugned words, taken at its highest, had only a *Chase* level 3 meaning, ie the lesser imputation that there were reasonable grounds for investigation or that the plaintiff should come forward and give an explanation. Based on the evidence adduced by the defendant, he was entitled to succeed as he had proven on a balance of probabilities that there were grounds for investigation to be carried out and for the plaintiff to give an explanation on the matter (see paras 95, 98–99 & 101–104).

(2) The plaintiff's complaint that the defendant had not produced his sources of information, meaning the informants within MARA and/or UMNO, who gave him the information, had no merit. In this regard, one could readily understand the defendant's reluctance to expose those who had given him information in confidence. To expose the informants would have been a betrayal of the confidence (see paras 106–107).

(3) As for the defendant's failure to call the Australian solicitor in respect of the Australian court proceedings, the defendant had led evidence to show that the solicitor concerned had forwarded to court transcripts to the defendant. Similarly, an adverse inference could not be drawn against the defendant for his failure to call the Australian journalist who had provided him with information on the property transactions in Australia because the defendant had provided other relevant documents to verify his statements. There was enough evidence to demonstrate that there was a prima facie case for investigations to be carried out to determine the identities of those who were involved in the property transactions. In any case, it was evident that in seeking to justify a *Chase* level 3 meaning the defendant was entitled to rely on circumstantial and hearsay evidence to justify the meaning. Thus, on this point alone the plaintiff's claim stood to be dismissed (see paras 107 & 109–110).

(4) In relation to the defence of fair comment, although the impugned words in the fourth paragraph would not constitute a statement of fact but a comment or opinion by the defendant, there was no doubt that the property transactions involved the public interest. Further, the defendant was not actuated by malice but actuated by a public spirited duty to disclose wrongdoings involving public funds (see paras 113–114).

(5) In so far as it was suggested that the defendant was reckless because he did not verify with the plaintiff, the position in law was that verification with the plaintiff was not mandatory in all circumstances and situations. The evidence also showed that the defendant had done his own investigations after being tipped off by informants within MARA and/or UMNO and that he had gathered much detailed information and documents concerning the property transactions. In the result, the plaintiff's suggestion that the defendant was reckless to the truth was totally misplaced (see paras 115 & 117).

[Bahasa Malaysia summary

Plaintif adalah pada setiap masa matan Timbalan Ketua Pemuda Pertubuhan Kebangsaan Melayu Bersatu Malaysia ('UMNO') dan ahli majlis tertinggi UMNO, manakala defendan, seorang akauntan bertauliah yang berkelayakan, adalah pada setiap masa matan ahli Parti Keadilan Rakyat ('PKR') dan Ahli Parlimen untuk kawasan Parlimen Pandan di Kuala Lumpur. Defendan telah membuat beberapa kenyataan akhbar dan maklumat yang disiarkan, yang mendedahkan bahawa Majlis Amanah Rakyat ('MARA') telah, melalui anak syarikatnya membeli hartanah pada harga yang melambung tinggi dan bahawa sebahagian daripada wang belian itu kemudiannya disalurkan semula kepada pelbagai pihak dalam atau berkaitan dengan MARA. Plaintif mendakwa bahawa di satu sidang akhbar yang diadakan pada 6 Julai 2015, defendan telah mengeluarkan kenyataan akhbar bertajuk entitled 'Individu Terbabit Di Dalam Urusniaga MARA Perlu Tampil Memberi Penjelasan' ('kenyataan akhbar tersebut') yang mencadangkan bahawa plaintif dan ahli lain Exco Belia UMNO yang tertentu terlibat secara langsung dengan dan oleh itu terlibat dalam skandal belian hartanah MARA tersebut. Dalam kenyataan akhbar tersebut defendan memohon untuk menekankan empat transaksi untuk belian empat hartanah di Australia pada harga yang dinaikkan atau harga-harga melebihi nilai pasaran untuk hartanah-hartanah tersebut oleh anak syarikat milik penuh MARA. Menurut defendan, transaksi-transaksi tersebut teah dijalankan melalui struktur korporat yang rumit yang terdiri daripada beberapa lapisan syarikat-syarikat asing dan luar pesisir dan bukannya MARA yang terus memasuki transaksi-transaksi hartanah itu dan ini telah mengakibatkan MARA terlebih bayar RM129 juta untuk belian hartanah-hartanah Australia itu ('skandal belian hartanah MARA'). Menurut plaintif, kenyataan akhbar tersebut, yang akhirnya telah disiarkan dalam media atas talian, telah memfitnahnya. Oleh kerana nama plaintif telah disebut dalam kenyataan akhbat tersebut, plaintif mengatakan bahawa reputasinya telah dihina kerana kata-kata yang menyinggung perasaan yang telah disampaikan itu membawa maksud bahawa dia telah terlibat secara langsung dengan dan oleh itu terlibat dala transaksi-transaksi hartanah tersebut. Plaintif dengan itu telah memfailkan guaman ini untuk fitnah terhadap defendan. Ia adalah kes plaintif bahawa meskipun ia tidak ada kaitan dengan skandal belian hartanah MARA, kata-kata yang digunakan dalam kenyataan akhbar tersebut ('kata-kata yang dipersoalkan') telah merendahkan dirinya dalam jangkaan pemikiran masyarakat. Plaintif mempli bahawa kata-kata yang dipersoalkan itu boleh difahami untuk bermaksud, antara lain, bahawa dia seorang yang tidak jujur dan seorang yang korup, yang telah bertindak untuk kepentingannya sendiri dan telah menyalahgunakan kedudukannya sebagai Timbalan Ketua Pemuda UMNO dan telah terlibat dalam skandal belian hartanah MARA. Dalam pembelaannya defendan telah menafikan bahawa kata-kata yang diadukan itu memfitnah plaintif. Sebaliknya defendan memohon untuk menjustifikasikan kata-kata yang dipersoalkan itu berasaskan

A makna yang kurang atau apa yang kini difahami sebagai makna tahap 3 *Chase* sebagaimana yang diperolehi daripada kes *Chase v Newsgroup Newspapers Ltd* [2002] EWCA Civ 1772 ('kes *Chase*'). Defendan mendakwa bahawa maksud alternatif adalah lebih munasabah dalam keadaan kes ini. Defendan juga bergantung kepada pembelaan ulasan adil dengan berhujah bahawa fakta B berkaitan skandal belian hartanah MARA, yang merupakan hal perkara kenyataan akhbar tersebut, adalah adil dan berkenaan dengan suatu perkara yang mempunyai kepentingan awam.

Diputuskan, menolak tuntutan dengan kos RM73,000:

C (1) Sebagaimana yang didapati daripada pelbagai autoriti kes yang dirujuk oleh pihak-pihak, prinsip panduan bagi menentukan makna yang hendak disifatkan kepada perkataan fitnah itu adalah, antara lain, tafsiran yang munasabah dan tidak tegang atau salah atau benar-benar tidak D munasabah. Dengan mengikut kes *Chase* ia kini tetap bahawa kata-kata yang dipersolakan tersebut mampu mempunyai tiga tahap makna. Dalam kes ini, kata-kata yang dipersoalkan tersebut adalah terkandung dalam enam perenggan dan kebanyakkan daripada perenggan tersebut telahpun dibuktikan benar atau diterima sebagai benar oleh plaintif, E kecuali untuk perenggan keempat. Walau bagaimanapun, perenggan keempat itu tidak berdiri dengan sendiri tetapi membentuk sebahagian daripada naratif di mana berikutan perenggan kelima, defendan telah merayu agar satu siasatan dijalankan ke atas mereka yang terlibat dalam transaksi-transaksi hartanah itu. Dalam keadaan berikut perenggan F keempat tidak membawa maksud berunsur fitnah bahawa plaintif adalah, antara lain, bersalah kerana rasuah atau menyalahguna kuasa, sepertimana yang dihujah oleh plaintif, kerana ini akan meletakkan pentafsiran keseluruhan yang tegang dan tidak munasabah kepada kata-kata yang dipersoalkan tersebut. Sebaliknya, kata-kata yang G dipersoalkan tersebut, diambil pada tahap paling tingginya, hanya mempunyai maksud tahap 3 *Chase*, iaitu kurangnya taksiran bahawa terdapat alasan yang munasabah untuk siasatan atau bahawa plaintif perlu tampil memberikan penjelasan.Berdasarkan keterangan yang dikemukakan oleh defendan, dia berhak untuk berjaya kerana dia telah H membuktikan atas imbangan kebarangkalian bahawa terdapat alasan untuk siasatan dijalankan dan untuk plaintif memberikan penjelasan berhubung perkara tersebut (lihat perenggan 95, 98–99 & 101–104).

(2) Aduan plaintif bahawa defendan tidak mengemukakan sumber maklumatnya, bermaksud pemberi maklumat dalam MARA dan/atau I UMNO, yang memberinya maklumat itu, tidak mempunyai merit. Sehubungan itu, seseorang boleh dengan mudah memahami keengganan defendan untuk mendedahkan siapa yang telah memberikannya maklumat secara rahsia. Untuk mendedahkan pemberi maklumat itu akan mengkhianati keyakinan itu (lihat perenggan 106–107).

(3) Berhubung kegagalan defendan untuk memanggil peguamcara daripada Australia berkaitan prosiding mahkamah Australia, defendan telah mengemukakan keterangan untuk menunjuk bahawa peguamcara yang berkenaan telah mengemukakan kepada mahkamah transkrip kepada defendan. Begitu juga, satu inferens bertentangan tidak boleh dibuat terhadap defendan kerana kegagalannya untuk memanggil wartawan Australia yang telah memberinya maklumat tentang transaksi-transaksi hartanah di Australia kerana defendan telah memberikan dokumen lain yang relevan untuk mengesahkan kenyataannya. Terdapat keterangan yang mencukupi untuk menunjukkan bahawa terdapat kes prima facie untuk siasatan dijalankan bagi menentukan identiti mereka yang terlibat dalam transaksi-transaksi hartanah itu. Dalam apa-apa keadaan, ia jelas bahawa dalam menjustifikasikan maksud tahap 3 *Chase* defendan berhak untuk bergantung kepada keterangan mengikut keadaan dan dengar cakap bagi menjustifikasikan maksud itu. Oleh itu, berhubung perkara ini sahaja tuntutan plaintif boleh ditolak (lihat perenggan 107 & 109–110).

(4) Berhubung pembelaan ulasan yang adil, meskipun kata-kata yang dipersoalkan tersebut dalam perenggan keempat tidak merupakan kenyataan fakta tetapi ulasan atau pendapat oleh defendan, tidak terdapat keraguan bahawa transaksi-transaksi hartanah tersebut melibatkan kepentingan awam. Selanjutnya, defendan tidak bertindak dengan niat jahat tetapi bertindak atas kewajipan awam untuk mendedahkan salah laku yang melibatkan dana awam (lihat perenggan 113–114).

(5) Sejauh mana ia dicadangkan bahawa defendan bertindak melulu kerana dia tidak mengesahkan dengan plaintif, kedudukan undang-undang adalah bahawa pengesahan dengan plaintif tidak mandatori dalam semua keadaan dan situasi. Keterangan juga menunjukkan bahawa defendan telah melakukan siasatannya sendiri selepas diberi maklumat oleh pemberi maklumat dalam MARA dan/atau UMNO dan bahawa dia telah mengumpul maklumat dan dokumen terperinci berkaitan transaksi-transaksi hartanah tersebut. Hasilnya, cadangan plaintif bahawa defendan bertindak melulu berhubung kebenaran itu sama sekali tidak kena pada tempatnya (lihat perenggan 115 & 117).]

Notes

For a case on failure to call, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3577.

For cases on defences, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 456–498.

Cases referred to

Branson v Bower [2001] EWCA Civ 791, CA (refd)

Chase v Newsgroup Newspapers Ltd [2002] EWCA Civ 1772, CA (folld)

Cheng Albert v Tse Wai Chun Paul [2000] 4 HKC 1 (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)
Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242; [2014] 3 CLJ 560, CA (refd)
Gwee Tong Hiang v Boo Cheng Han [2016] 2 MLJ 388, CA (refd)
Jameel (Mohammed) and another v Wall Street Journal Europe Sprl [2007] 1 AC 359, HL (refd)
Jameel and another v Times Newspapers Limited [2003] EWHC 2609, QB (refd)
Jameel and another v Times Newspapers Limited [2004] EWCA Civ 983, CA (refd)
Jeynes v News Magazines Ltd and another [2008] EWCA Civ 130, CA (folld)
Johnston v League Publications Ltd [2014] EWHC 874, QBD (refd)
King v Telegraph Group Limited [2004] EWCA Civ 613, CA (refd)
Lee Kuan Yew v Derek Gywn Davies & Ors [1990] 1 MLJ 390, HC (refd)
Lewis and another v Daily Telegraph Ltd [1963] 2 All ER 151; [1964] AC 234, HL (refd)
Lucas-Box v Associated Newspapers Group plc and others [1986] 1 All ER 177, CA (refd)
Lyon and another v The Daily Telegraph, Limited [1943] KB 746, CA (refd)
Mirzan bin Mahathir v Star Papyrus Sdn Bhd [2000] 6 MLJ 29, HC (refd)
Musa King v Telegraph Group Ltd [2003] EWHC 1312, QB (refd)
Oei Hong Leong v Ban Song Long David and Others [2005] SGCA 35, CA (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233; [1988] 1 CLJ 771, SC (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (refd)
Slim v Daily Telegraph Ltd [1968] 2 QB 157, CA (refd)
Spiller v Joseph [2010] UKSC 53, SC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187, FC (refd)
Telnikoff v Matusevitch [1991] 4 All ER 817, HL (refd)
Tim Yeo MP v Times Newspapers Limited [2014] EWHC 2853, QB (refd)
Workers' Party: Tay Boon Too; Workers' Party v Attorney-General [1975] 1 MLJ 47 (refd)

Legislation referred to

Defamation Act 1957 ss 8, 9
Whistleblowers Protection Act 2010

M Reza Hassan (Ellia Zuraini bt Mat Zin and Umi Farhanah bt Mohd Nasir with him) (Raja Riza & Assoc) for the plaintiff.
William Leong Jee Keen (Abdul Halim bin Abdul Karim with him) (William Leong & Co) for the defendant.

S Nantha Balan J:

INTRODUCTION

[1] This is an action for defamation and it arises out of a much publicised property purchase scandal involving a subsidiary of Majlis Amanah Rakyat ('MARA'). This case brings into sharp focus, the right of an individual to protect his reputation under the laws of defamation and the right of an individual to disseminate information and contribute to public discussion by raising public awareness on a matter of national importance, which in the present context, refers to what has become known as the MARA property purchase scandal.

THE PROPERTY PURCHASE SCANDAL

[2] It has been described as a national scandal because it involves a public institution, namely MARA, which is an agency under the Ministry of Rural and Regional Development. MARA was set up and funded with public funds to aid, train the Bumiputra segment of Malaysian society in the areas of business and industry. Apart from actively assisting Bumiputra entrepreneurs, MARA is also heavily involved in the education sector in Malaysia. It is an iconic and important institution for the larger segment of Malaysian society. In gist, the defendant had made press releases and published information which revealed that MARA had, through its subsidiary, purchased properties in Australia at hyper-inflated prices and that some part of the purchase monies were subsequently channeled back to various parties within or connected to MARA or the political establishment. It is not in dispute that prior to and up to 6 July 2015, the defendant had published several press releases pertaining to the MARA property purchase scandal. The action for defamation by the plaintiff is based on a particular press conference held on 6 July 2015 by the defendant. The said press conference was attended by journalists from various media organisations. At the press conference, the defendant had issued a press release entitled 'Individu Terbabit Di Dalam Urusniaga Mara Perlu Tampil Memberi Penjelasan' ('the press release').

[3] The direct translation, of the tide to the press release is — 'the individuals involved in the MARA transaction need to come forward and explain'. The press release was carried in the online media. The defendant does not deny that he issued the press release and that it was published.

SYNOPSIS OF CLAIM AND DEFENCE

[4] The plaintiff contends that the press release which was subsequently published in the online media (as particularised in para 7 of the statement of claim) has defamed him. He claims that the press release suggests that he is

directly involved with and therefore implicated in the MARA property purchase scandal. However, the defendant denies that the words complained of are defamatory of the plaintiff. He has provided an alternative meaning to the impugned words which the plaintiff complains of and has sought to justify it on the basis of a lesser meaning or what is now understood as a *Chase* level 3 meaning (see: *Chase v Newsgroup Newspapers Ltd* [2002] EWCA Civ 1772 (CA)), which will be discussed in greater detail elsewhere in this judgment. The defendant claims that the alternative meaning is one which is reasonable in all the circumstances. He also sought to justify the *Chase* level 3 meaning.

[5] The defendant also relies on the defence of fair comment and this is in turn predicated on his assertion that he made statements of fact which were true and also (in the fourth paragraph) expressed a comment or an opinion which he honestly held in respect of a matter of public interest and where he claims that the facts relating to the MARA property purchase scandal, with all its intricate web and layers of transactions, which are the subject matter of the comment, are true. Finally, and still on the defence of fair comment, the defendant maintains that the plaintiff has not established that there was malice on his part such as to defeat the defence of fair comment.

[6] For completeness, I should add that after the defendant's press release was issued, the plaintiff held his own press conference on the same day and denied the allegations that were made against him and demanded that the defendant apologise to him. It is not in dispute that prior to the press release the defendant never contacted the plaintiff to seek any clarification with respect to the MARA property purchase transaction. It is also not in dispute that the plaintiff is not personally known to the defendant and he has no grouses with the plaintiff. I shall now proceed to describe the parties.

THE PARTIES

[7] The plaintiff was at all material times the Deputy Youth Chief of the United Malaysia National Organisation ('UMNO') and is also a supreme council member of UMNO, He is also a director and the Chairman of Biosis Group Bhd ('Biosis'). The defendant is a qualified chartered accountant and has worked in that capacity for several years before entering politics. The defendant is a member of Parti Keadilan Rakyat ('PKR') and the Member of Parliament for the Parliamentary constituency of Pandan in Kuala Lumpur. He is also the General Secretary and Vice President of PKR. Apart from being a politician, the defendant is also a whistleblower of sorts and has in the past publicly exposed various mega-scandals. But a whistleblower has no immunity from the general law of defamation and stands in the same position as any other individual.

NATIONAL OVERSIGHT AND WHISTLEBLOWERS

[8] As such, the defendant has paid a heavy price for his public spirited actions and has been sued for defamation and has faced or is also facing criminal proceedings. However, I will say no more about these other legal proceedings and they will not be discussed in this judgment other than being mentioned here only as part of the overall narrative and background and to more fully understand the defendant's stand on various public interest or national issues.

[9] The defendant does not believe that the Whistleblowers Protection Act 2010 ('the Act') is an effective piece of legislation to encourage whistleblowing. In fact he maintains that the Act is detrimental to whistleblowers as there are (according to him) restrictions on the kind of information whistleblowers are allowed to disclose and to whom they can disclose. He said there was an outcry against the Act and that this signifies the public perception that the Act is put in place to intimidate whistleblowers. Returning to the issue at hand, at the material time of the press release, the defendant was/is the executive director of an organisation known as National Oversight and Whistleblowers ('NOW'). As the name suggests and as duly explained by the defendant during the trial, the *raison d'etre* of NOW is to, raise public awareness of, inter alia, national scandals. Elaborating on the purpose of setting up NOW, the defendant said:

Q2	What is NOW?
A2	It is a non-government organization ('NGO') and a non-profit body set up to promote the cause of whistleblowers. We recognize the need to institute public-driven oversight initiatives and the role of whistleblowers in a mature society.
Q3	How is NOW funded?
A3	NOW is funded through public donation, subscription, consultancy, personal contribution and grants.
Q4	What does NOW do and how are its operations run?
A4	NOW is run by a small team of dedicated analysts and supported by a big team of volunteers who collectively investigate possible national scandals, analyse parliamentary, government and corporate reports, advocate change of laws to promote public driven oversight initiatives, produce oversight reports, defend whistleblowers and fight legal cases in the national interest.
Q5	There is a Whistleblowers Protection Act 2010, why is it necessary to have an NGO like NOW?
A5.1	Whistleblowers play an important role in a mature society. In societies where there is a distrust of the establishment's seriousness to act independently against corruption and abuse of power, whistleblowers provide the spark to fuel public opinion that can subsequently exert enough pressure for actions to be taken against corrupt public officials.

A5.2 Even in a truly functioning democracy with credible institutions, whistleblowers provide key breakthroughs that can safeguard public interest especially from within corporate walls to avoid corporate scandals that normally would have escaped public attention, if not highlighted by whistleblowers to safeguard public interest. There have been various documented cases from around the world as proofs of the positive role played by whistleblowers to safeguard public interest.

A5.3 The existing Whistleblowers Protection Act 2010 is inadequate to encourage whistleblowers to come forward. It is in fact more detrimental to whistleblowers as there are restrictions on the kind of information whistleblowers are allowed to disclose and to whom they can disclose. The outcry against the Act signifies the public perception that the Act is put in place to intimidate whistleblowers and was enacted hastily.

A5.4 In 2012, the persons instrumental in disclosing a high level financial scandal involving the family of a senior government minister were charged in court. The events leading up to the arrest and prosecution of the whistleblowers point to a hardening position taken by the authority against whistleblowers that necessitated a re-look at the whole framework of whistleblower's protection and oversight function in Malaysia.

A5.5 Convinced that the authority is empowered by existing laws to silence future whistleblowers and the task of protecting whistleblowers can only be carried out sincerely by the civil society, a group of social activists founded NOW to focus on defending whistleblowers and promoting public driven oversight initiatives.

Q6 You have been sued by the Plaintiff, Khairul Azwan bin Haiun for defamation relating to a press statement you released on 6 July 2015. This press statement is in Common Bundle of Documents page 19–22, a clearer copy of this document is in Defendant Bundle 3 page 1–4. What if any has this press statement to do with NOW?

A6.1 NOW encourages whistleblowers to come forward with information and evidence of any form of mismanagement, neglect, corruption or omission that is detrimental to the public interest irrespective of where or who commits the misdeed. In this case whistleblowers have given me information relating to the purchase by MARA of 4 properties in Australia at prices well above market prices for which those involved received a 'kickback' or 'commission' of AUD 4.75 million.

THE PLAINTIFF'S PLEADED CASE

[10] I turn now the plaintiff's pleaded case. In para 5.1 of the statement of claim, the plaintiff has identified the offending words from the press release which he claims are defamatory of him. It pertains to the questionable purchases of properties in Australia by MARA through its subsidiary, MARA Incorporated Sdn Bhd ('MARA Inc'). In this judgment, I shall refer to these property purchases as 'the property transactions'. The property transactions were purportedly undertaken by a subsidiary of MARA Inc namely Thrushcross Land Holdings Ltd, a British Virgin Island registered company or

commonly known as a BVI company. According to the press release, there were serious irregularities and misappropriation of monies belonging to MARA as a result of the property transactions. The plaintiff claims that the press release had identified certain individuals who were allegedly involved in the property transactions. Some of these individuals are connected to MARA whereas some are not.

[11] Also, some of the persons mentioned in the press release are members of UMNO and some had links with UMNO or UMNO Youth or to the plaintiff or to Biosis. The plaintiff's name is also mentioned in the press release. As such, the plaintiff alleges that his reputation has been maligned because the offending words have conveyed the meaning that he is directly involved with and therefore implicated in the property transactions. I turn now to the impugned words that are said to be defamatory of the plaintiff.

THE IMPUGNED WORDS

[12] The impugned words as per para 5.1 of the statement of claim, which allegedly convey a defamatory meaning of the plaintif are as follows:

(i) Erwan Azizi dan Izmir Abdul Hamid adalah rakan kongsi yang mempunyai banyak kepentingan perniagaan dengan pimpinan Umno dan Pemuda Umno;

(ii) Erwan Azizi adalah Pengarah Eksekutif Optimus Capital Sdn Bhd (sila rujuk laporan The Edge mengenai pemilikan saham beliau). Selain beliau, pengarah dan pemegang saham Optimus Capital Sdn Bhd yang lain adalah seorang yang bernama Mazrul Haizad Maarof (rujuk carian SSM yang disertakan bersama). Individu ini (Mazrul Haizad Maarof) adalah abang ipar kepada Dazma Shah Daud, EXCO Pemuda Umno;

(iii) Erwan Azizi juga adalah pengarah bukan eksekutif Biosis Group Berhad yang dipengerusikan oleh Khairul Azwan Haran, Naib Ketua Pemuda Umno Malaysia;

(iv) Seperti yang telah dilaporkan minggu lepas, hartanah ini dijual pada harga AUD$23.5 juta seperti rekod di Australia tetapi jumlah yang diluluskan oleh MARA adalah AUD$41.8 juta (bersamaan RM138.6 juta). Ada ketirisan sebanyak RM63 juta yang perlu dijawab oleh individu-individu yang saya namakan pada hari ini iaitu Erwan Azizi, Izmir Abdul Hamid, Mazrul Haizad Maarof, Dazma Shah Daud dan Khairul Azwan Haron yang semuanya adalah sama ada pemegang jawatan Pemuda Umno ataupun individu yang rapat dengan mereka;

(v) Siasatan dan tindakan yang diambil ke atas individu-individu yang terbabit di dalam skandal MARA ini mestilah juga membabitkan mereka yang berada di belakang tabir yang bertindak sebagai pengatur atau broker kepada urusniaga yang merugikan MARA ini; dan

(vi) Saudara Khairy Jamaluddin perlu tampil ke hadapan memberi penjelasan

bagaimana individu-individu yang berkaitan dengan pimpinan Pemuda Umno telah terlibat dan berkait dengan skandal ini. Maklumat yang diberikan kepada saya menyatakan bahawa mereka ini terlibat sebagai pengatur kepada urusniaga-urusniaga ini dan berkemungkinan mendapat keuntungan dari urusniaga ini — maka wajarlah Saudara Khairy Jamaluddin memberi penjelasan yang sebaiknya.

('the impugned words').

THE DEFAMATORY MEANINGS

[13] The plaintiff pleads in para 9 of the statement of claim that in its natural and ordinary meaning, the impugned words mean or may be understood to mean or may bear the meaning that:

(a) the plaintiff is a dishonest and a corrupt person;

(b) the plaintiff had acted for his own pecuniary interest;

(c) the plaintiff is an untrustworthy person;

(d) the plaintiff has not been transparent when dealing with business transactions;

(e) the plaintiff had misused his position as Chairman of Biosis for his own pecuniary interests;

(f) the plaintiff had misused his position as the Vice Youth Chief of UMNO in the property transaction;

(g) the plaintiff is involved in a dubious business transaction to the detriment of the public; and

(h) the plaintiff had not acted in the best interest of the public.

[14] The plaintiff pleads in para 10 of the statement of claim that as a result of the publication of the impugned words:

(a) his reputation and dignity as a businessman and a politician has been tarnished;

(b) he has been brought to ridicule and public contempt due to his alleged involvement with a dubious transaction for his own pecuniary interest;

(c) he has been brought to ridicule and public contempt for prioritising his own personal interest rather than the interest of the public; and

(d) his credibility as a businessman and a politician has been brought into disrepute.

THE DEFENCE

[15] The defence of the defendant is that:

(a) the impugned words are fair comment on a matter of public interest, namely the conduct of the following persons who are members of UMNO Youth Exco or persons dose to UMNO Youth Exco ('the connected persons') who are involved in four transactions for the purchase of properties at marked-up prices which are above market value by a wholly owned subsidiary of MARA. The connected persons are:

(i) Erwan Azizi;

(ii) Izmir Abdul Hamid;

(iii) Mazrul Haizad Maarof; and

(iv) Dazma Shah Daud;

(b) the defendant also pleads that the impugned words, in the natural ordinary meaning, are not defamatory of the plaintiff. In seeking to provide a reasonable alternative meaning or a 'Lucas-Box' meaning (see: *Lucas-Box v Associated Newspapers Group plc and others* [1986] 1 All ER 177 (CA)), it was contended by the defendant (per paras 6–7 of the defence) that the words meant and were understood to mean that the plaintiff as Vice-Head of UMNO Youth and Khairy Jamaluddin as Head of UMNO Youth have obligations as office bearers of the youth wing of the ruling political party in Malaysia:

(i) to provide a public explanation on the involvement of the connected persons in the property transactions because the connected persons were at all material time members or close to members of the UMNO Youth Executive Committee ('UMNO Youth Exco'); and

(ii) to provide a public explanation of the investigations and actions taken against the connected persons involved in the property transactions.

[16] The defendant contends that the impugned words have to be understood in the context of the series of press statements which he had issued in relation to the property transactions. The series of press statements are stated in para 4 of the defence and are as follows:

The press statements

Date	Title	Summary of Statement
29 June 2015 ('the 29 June statement')	Struktur syarikat MARA Inc memudahkan penyelewengan, Tan Sri Anuar Musa melawat hartanah.	– That Anuar Musa was aware of the transactions and in fact visited the properties. – To expose the use of multilayered companies structure and offshore entities to mark the transactions.
30 June 2015 ('the 30 June statement')	Pulangan pelaburan di bawah kadar pasaran, MARA bayar RM33 juta lebih mahal beli satu bangunan.	– That the yield and investment return is below market rate. – To expose the inflated price of 333 Exhibition Street.
1 July 2015 ('the 1 July statement')	MARA turut terlebih bayar RM18 juta untuk bangunan 51 Queen Street	– To expose the inflated price of 51 Queen Street.
2 July 2015 ('the 2 July statement')	Penyelewengan RM63 juta dana MARA dalam pembelian hartanah keempat, jumlah penyelewengan RM129 juta dana MARA.	– To expose the inflated price of 746 Swanston Street. – To expose the total inflated price for 4 properties
6 July 2015 ('the 6 July statement')	Individu terbabit di dalam urusniaga mara perlu tampil memberi penjelasan.	– To expose the individuals , involved in the transactions.

[17] The defendant relies on the facts set out in the following paragraphs in support of his defence of fair comment and that the impugned words are not defamatory of the plaintiff in the natural and ordinary meaning in the context that they are meant and were understood to mean from the series of press statements.

[18] In the defence, it is contended that MARA is an agency under the purview of Ministry of Rural and Regional Development and amongst its subsidiary is MARA Inc.

[19] The funds allocated to MARA is from the Federal Government of Malaysia which in turn is obtained from the tax-payers and therefore public

interest is involved in the manner in which the funds are used by MARA. The properties which MARA purchased through its subsidiaries are:

(a) Dudley House;

(b) 333 Exhibition Street;

(c) 51 Queen Street; and

(d) 746 Swanston Street.

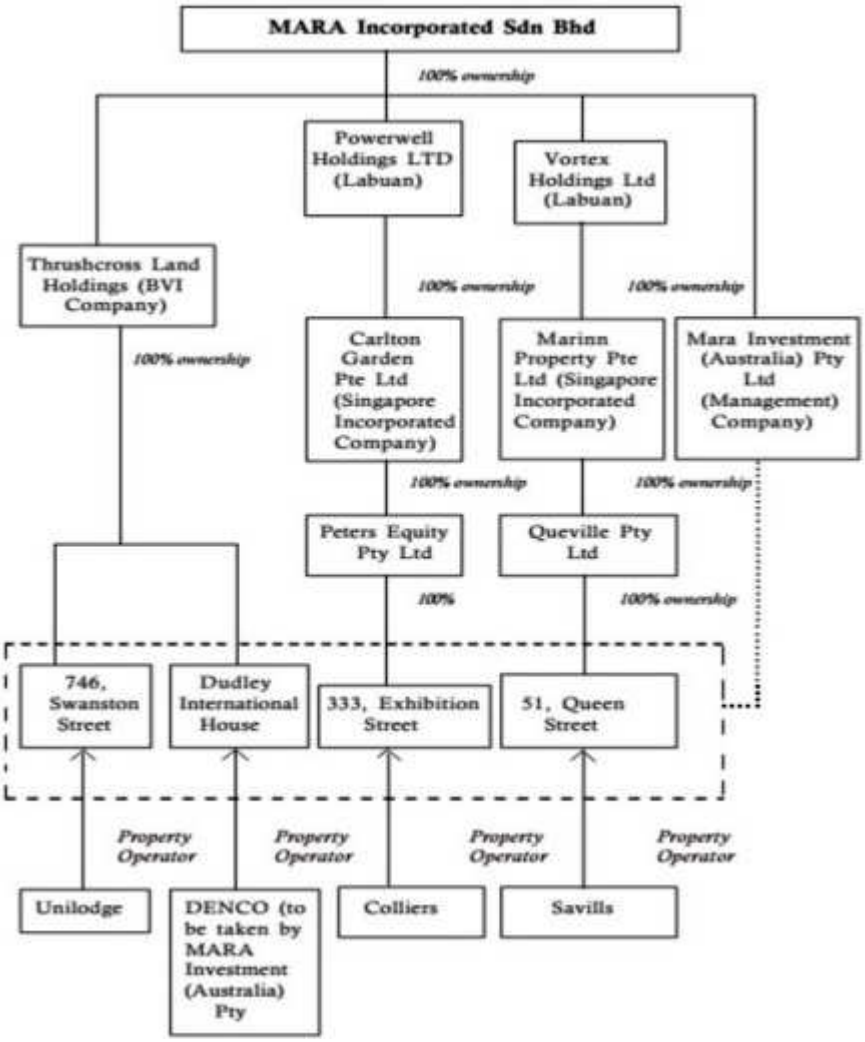
THE OVERPAYMENT

[20] The defendant claims that MARA paid purchase prices above the market value in the property transactions as per para 3 of the defence as follows:

Property	Payment by MARA	Market Value	Amount Overpaid
Dudley House	AUD$22.6 million RM67.2 million	AUD17.85 million	AUD$4.75 million RM15.2 million
333 Exhibition Street	AUDS31 million RM99.2 million	AUD$22 million RM66.2 million	AUD$9 million RM33 million
51 Queen Street	AUD$22 million RM70.4 million	AUD$ 16.65 million RM52.4 million	AUDS5.35 million RM18 million
746 Swanston Street	AUD$41.8 million RM138.6 million	AUD$23.5 million RM75.7 million	AUD$18.3 million RM62.9 million
Total			*RM129 million*

USE OF OFFSHORE COMPANIES

[21] The defendant also states that the property transactions involved the use offshore companies in British Virgin Island ('BVI'), Labuan and Singapore, the effect of which is to prevent the public from knowing that the ultimate purchaser is MARA Inc. The use of the offshore companies is illustrated by the chart below:



[22] For the purchase of 746 Swanston Street and Dudley International House, it is alleged by the defendant that a BVI company called Thrushcross Land Holdings was used. For the purchase of 333 Exhibition Street and 51 Queen Street 3 it is alleged that companies in different countries were used:

(a) for 333 Exhibition Street the property is held by MARA Inc through Powerwell biddings Ltd (registered in Labuan) which in turn owns Carlton Garden Pte Ltd (registered in Singapore) which in turn owns Peters Equity Pty Ltd (registered in Australia) which owns the property; and

(b) for 51 Queen Street the property is held by MARA Inc through Vortex Holdings Ltd (registered in Labuan) which in turn owns Marinn Property Pte Ltd (registered in Singapore) which in turn owns Queville Pty Ltd (registered in Australia) which owns the property.

THE CONNECTION BETWEEN MARA AND INDIVIDUALS

[23] In terms of the connection or nexus between MARA and the individuals who were associated with these property transaction, it was contended that two out of the four directors in Thrushcross Land Holding Ltd are Erwan Azizi and Izmir Abdul Hamid who have no connection with MARA. But, Erwan Azizi and Izmir Abdul Hamid are business associates of the plaintiff:

(a) Erwan Azizi is a director in Biosis whose chairman is the plaintiff who in turn is Vice-Head of UMNO Youth; and

(b) Erwan Azizi is also the Executive Director of Optimis Capital Sdn Bhd. A director and shareholder of Optimis Capital Sdn Bhd is Mazrul Haizad Maarof. Mazrul Haizad Maarof is the brother-in-law of Dazma Shah Daud who is a member of UMNO Youth Exco.

[24] During the trial, the defendant produced the notes of proceedings and some of the documents that were tendered in court proceedings in Australia where these property purchases were being judicially investigated and unraveled. For the purchase of Dudley House, the Australian court's documents showed that Dazma Shah Daud, Mazrul Haizad Maarof and Erwan Azizi were involved.

[25] A total amount of AUD$4.75m were invoiced by three Malaysian companies to the vendor who sold the property to MARA Inc at a marked-up price. The three companies are either owned and/or had directors who are connected to UMNO Youth as per para 7(i) of the defence and are as follows:

Companies	Connection To UMNO Youth	Amount Invoiced For Kickback
Leuven Capital Sdn Bhd (formerly FRP Prestige)	UMNO youth Exco Member, Dazma Shah Daud was a director at the material time. Dazma's brother-in-law, Mazrul Haizad Maarof was a director at the material time.	AUD$3.35m
Optimus Capital Group of Companies Sdn Bhd	Umno Youth Exco Member, Dazma Shah Daud was a director at the material time.	AUD$675k

Companies	Connection To UMNO Youth	Amount Invoiced For Kickback
	Dazma's brother-in-law, Mazrul Haizad Maarof was a director at the material time. Erwan Azizi was a director at the material time material and a major shareholder in the company of which the plaintiff is the chairman.	
TRR Heritage Sdn Bhd	Dazma's brother-in-law, Mazrul Haizad Maarof was a majority shareholder and director at the material time.	AUD$725k

[26] According to the Australian court's documents, Dato' Abdul Ghani Yusof, Dato' Azizi Yom Ahmad, Wanissa Properties Pty Ltd, PMCD Investments Pty Ltd, Dennis Teen, Ahmad Nazim bin Abdul Rahman the Chief Executive Officer of MARA and the connected persons entered into an arrangement whereby a purchase price of AUD$22.6m is to be paid for the purchase of Dudley House by Thrushcross Land Holdings and AUD$4.75m *(being the difference between the purchase price of AUD$22.6m over the market price of AUD$ 17.85m)* would be paid out from the sales proceeds to Leuven Capital Sdn Bhd, Optimus Capital Group of Companies Sdn Bhd and TRR Heritage Sdn Bhd.

[27] The defendant also relies on ss 8 and 9 of the Defamation Act 1957.

ISSUES TO BE TRIED

[28] The issues to be tried are:

(i) whether the impugned words are defamatory of the plaintiff?

(ii) if the impugned words are defamatory of the plaintiff, whether the defendant can rely on the defence of fair comment?

(iii) if the impugned words are defamatory of the plaintiff, whether the defendant can rely on the defence of justification? and

(iv) if the defence in paragraph (ii) above is applicable, whether the defence is defeated by malice?

THE EVIDENCE — THE PLAINTIFF'S EVIDENCE

[29] I will start with the plaintiff's evidence. In his testimony, the plaintiff said that he had nothing to do with the property transactions. His evidence was

as follows:

S: Mengapakah anda katakan bahawa Perkataan Yang Diadu tersebut merupakan suatu fitnah terhadap anda?

J: Perkataan Yang Diadu tersebut adalah palsu dan tidak benar.

S: Jelaskan?

J: Melalui Perkataan Yang Diadu tersebut, Defendan menyatakan bahawa saya terlibat dalam satu transaksi jual beli hartanah diantara MARA Incorporated Sdn Bhd (MARA) dan Thrushcross Land Holdings Limited yang mana transaksi jual beli tersebut dikatakan adalah merugikan MARA.

Saya juga dikatakan menyalahgunakan jawatan saya sebagai Naib Ketua Pemuda UMNO dan Pengerusi Biosis Group Berhad untuk meraih keuntungan daripada transaksi tersebut.

Saya juga dikatakan terlibat sebagai pengatur atau broker dalam transaksi yang meragukan tersebut yang mana transaksi tersebut telah menjejaskan kepentingan orang ramai. Kesemua kenyataan-kenyataan yang dibuat oleh Defendan terhadap saya berhubung transaksi tersebut adalah fitnah dan tidak benar sama sekali.

S: Mengapa anda berkata demikian?

J: Tuduhan yang dilemparkan oleh Defendan terhadap saya adalah tidak berasas. Saya tidak terlibat sama sekali dalam tansaksi jual beli hartanah diantara MARA dan Thrushcross Land Holdings Limited. Saya tidak mempunyai sebarang kepentingan dalam MARA, Thrushcross Land Holdings Limited, Optimus Capital Sdn Bhd atau mana-mana syarikat yang terlibat dalam transaksi tersebut seperti yang dinyatakan oleh Defendan dalam Kenyataan tersebut.

See: Questions and answers 30–32 of PW1 (A)

[30] The plaintiff had further testified that the impugned words had lowered him in the estimation of right-thinking members of society. In this regard, he said:

S: Apakah kesan daripada tindakan Defendan tersebut?

J: Ekoran daripada tindakan Defendan memfitnah saya melalui Kenyataan tersebut, saya telah dipandang rendah oleh masyarakat umum kerana kononnya saya telah menyalahgunakan jawatan saya semata-mata demi kepentingan saya sendiri. Saya juga telah dipandang rendah dan hina oleh masyarakat umum kerana kononnya telah terlibat dalam transaksi yang meragukan dan merugikan MARA dan masyarakat. Kredibiliti saya sebagai seorang ahli perniagaan dan ahli politik telah terjejas dan dipertikaikan.

See: Question and answer 57 of PW1 (A).

EVIDENCE — THE DEFENDANT'S EVIDENCE

[31] I will now deal with the defendant's evidence. He explained that over a period of time, he gathered the requisite information on the property

transactions which was elicited from various sources. He described the information which he had received via his sources and the steps or actions that he took.

[32] His evidence on this topic was fairly substantial and it is necessary and imperative that they be reproduced in full to understand the depth and substance of the answers that he gave to the questions that were posed.

RECEIPT OF INFORMATION BY THE DEFENDANT

[33] The following was the testimony of the defendant as to how he gathered the information on the property transactions:

Q7 What information did you receive?

A7 The first information I received on MARA's property investments in Australia was through correspondence with John Garnaut the journalist from Fairfax Media who was investigating the case. We exchanged a few emails through which he shared the information he had relating to the property investments. This was in March 2015. I did not act on it at the time because I did not have any documents from MARA or the government to confirm the actual prices paid by MARA for the 4 properties. Fairfax Media's investigation at the time only showed the market value of those properties but I could not compare them with the amounts approved by MARA.

Around the same time that the news was first reported in Australia in late June 2015, an anonymous whistleblower gave me internal MARA documents including a presentation of MARA's investment in properties in Australia given to the top management of MARA which contain certain information on the amount paid by MARA for each property. Comparing the information made available to me by whistleblowers at that point, I concluded that MARA had bought four properties in Australia at inflated prices.

I then requested my colleague at NOW, Akmai Nasir to travel to Melbourne to obtain the court documents on the Dudley House so as to get a clearer picture of who were involved in the scheme. He obtained a set of documents that include the transcript of court documents of a case in the Australian Courts which contained testimony that the vendor had only wanted to sell Dudley House at AUD17.8 million but an additional AUD 4.75 million was added to the purchase price such that MARA ended up by paying AUD22.6 million. This additional AUD4.75 million was paid as 'kickbacks' to three companies.

He also obtained copies of a letter of indemnity and invoices which show the vendor of Dudley House, Wanissa Property Ltd ('Wanissa') had paid AUD4.75 million to three companies, Leuven Capital Sdn Bhd, Optimus Capital Group of Companies Sdn Bhd and TRR Heritage Sdn Bhd.

WHAT THE DEFENDANT DID AFTER RECEIVING THE INFORMATION

[34] Next, the defendant explained what he did after obtaining the information:

Q10 What did you do after you receive this information?

A10 As the information did not come in one go, each time I receive an information we have a discipline to double check with other sources and look for official documents to corroborate. For example, when I first obtained the information from the Fairfax Media journalist, I did not go to the public straight away because I did not have any corroborating evidence to show that the properties were purchased above market value and some vested interests had benefitted from the marked up prices. It took us about three months before another whistleblower provided me with an internal MARA document that confirms the prices paid by MARA; after which I knew that the properties were overpaid.

At NOW, we carried out the same routine each time we received other information. In particular, we earned out a background check on every person named in the documents. We built a web of personalities connecting those named by whistleblowers or the official documents we obtained with public officials so as to ascertain whether or not the overpaid property purchases were a result of negligence or it was a premeditated plan to scam money from the public.

In this particular case, I was constantly in contact with a few whistleblowers from within MARA and Umno Youth who provided information on those named.

WHAT THE DEFENDANT FOUND OUT

[35] He then explained what he had found out about the property transactions:

Q11 What did you find out?

A11 I found out that Tan Sri Anuar Musa and a delegation from MARA together with Datuk Mohammad Lan Allani, the chairman of MARA Inc, who is responsible for the purchase of properties for MARA in Australia visited Melbourne, Australia. The trip was reported in the Malaysian Foreign Ministry website together with photographs of the trip.

Tan Sri Anuar Musa and the MARA delegation was briefed on the MARA Inc property investment and structure of the companies owned by MARA Inc in relation to four properties, that is:

1. 746 Swanston Street;
2. Dudley International House;
3. 333 Exhibition Street;
4. 51 Queen Street.

Q12 What did you find out about the company structure of the property purchased in Australia?

A12.1 Two properties, 746 Swanston Street and Dudley International House is owned by a MARA Inc subsidiaiy by the name of Thrushcross Land Holdings Limited incorporated in the British Virgin Islands.

A12.2 The ownership of the two other properties, 333 Exhibition Street and 51 Queen Street involved three layers of companies:

a. for 333 Exhibition Street, the property is held through Powerwell Holdings Limited (registered in Labuan) which in turn owned Carlton Garden Pte Ltd (registered in Singapore) which in turn owned Peter's Equity Pty Ltd (registered in Australia) which finally owned the property;

b. for 51 Queen Street, the property is held through Vortex Holdings Limited (registered in Labuan) which in turn owned Marinn Property Pte Ltd (registered in Singapore)' which in turn owned Queville Pty Ltd (registered in Australia) which finally owned the property;

Q13 What did you find out about the purchase price and investment return of these properties?

A13.1 I found out MARA paid about RM129 million more than the market price for these properties:

Property	Payment by MARA	Market Value	Amount Overpaid
Dudley House	AUD$22.6 million RM67.2 million	AUD17.85 million	AUD$4.75 million RM15.2 million
333 Exhibition Street	AUD$31 million RM99.2 million	AUD$22 million RM66.2 million	AUD$9 million RM33 million
51 Queen Street	AUD$22 million RM70.4 million	AUD$16.65 million RM52.4 million	AUD$5.35 million RM18 million
746 Swanston Street	AUD$41.8 million RM138.6 million	AUD$23.5 million RM75.7 million	AUD$18.3 million RM62.9 million
Total			*RM129 million*

THE PURPOSE OF THE PRESS RELEASE

[36] Next, the defendant explained the purpose of the press release. In this regard, he said;

Q26 What was the purpose of the press statement dated 1.7.2015?

A26 It was for the purpose of public interest to reveal that MARA had paid RM18 million more than the market price for 51 Queen Street.

Q27 What was the purpose for the press statement dated 2.7.2015?

A27 It was for public interest to ask the authorities to investigate into the four transactions which caused MARA to suffer substantial losses of about RM129 million.

Q28 What was the purpose of the Impugn Statement dated 7.7.2015?

A28.1 It is made on a matter of public interest. There has been a misuse of MARA funds. MARA is a government agency formed to assist, train and guide Bumiputras in providing education, business and industry. The money used to pay for the four properties is from the Federal Government. It is the Rakyat's money. Although there was much publicity in the Australian media of this scandal. There was no investigations by the local authorities and until today there is still no investigation.

A28.2 I have in the series of press statements revealed that MARA's purchase of the four properties have not been transparent by the use of a British Virgin Island company, an Offshore Labuan company and Singapore companies, MARA paid about RM129 million more than the market price for these properties, that the price paid did not justify the yield. The press statement on 7.7.2015 is to ask those involved in the transactions or those involved with them to come forward to explain and assist in the call for investigations of those who acted as brokers or arrangers for these transactions which ripped off MARA.

CONNECTION BETWEEN THE PARTIES

[37] On the issue of connection between those named in the press release, the defendant's evidence was as follows:

Q29 I refer to the 4th, 5th and 6th bullets of the Impugn Statement at CB: 20 referring to Erwan Azizi and Izmir Hamid have business interest with UMNO and UMNO youth leaders, Erwan Azizi is involved in Optimus Capital and also Biosis Group Berhad which chairman is the Plaintiff. What have you to say about these statement?

A29.1 There is a clear connection between the people involved in the kickback and certain UMNO Youth leaders. Erwan and Mazrul are directly involved in the AUD$4.75 million kickback. Being in politics myself, I understand the dynamics and mechanics of patronage in UMNO. While Erwan and Mazrul are the front for the transactions, it was my belief that they could only have access to the decision making process of MARA; or the MARA officials who are in a position to decide; because they are connected to UMNO politicians with a certain clout and influence.

A29.2 Erwan and Mazrul are directors of Optimus Capital Sdn Bhd or the Optimus Group of Companies are directly and indirectly involved in the AUD$4.75 million kickback. Erwan Azizi is the executive director, Mazrul Haizad bin Marof is also a director and shareholder of Optimus Capital, FRP Prestige Sdn Bhd (which is the former name of Optimus Capital) and Leuven Capital. Mazrul Haizad bin Marof is the brother-in-law of Dazma Shah Daud, a UMNO Youth Executive Committee member.

The Edge ACB :66 at 67 mark as _____;

SSM search of Biosis Group Bhd ACB: 1–8 mark as _____;

SSM search of Optimus Capital Group of Companies Sdn Bhd ACB: 16–18 mark as _____;

SSM search of Leuven Capital Sdn Bhd mark as _____;

A29.3 The impugn bullet paragraphs are statements of fact, Erwan Azizi became a non-independent, non-executive director of Biosis Group Bhd on 14.11.2014. According to a report by The Edge published on 6.2.2015 on off-market trades, there was a sizeable off-market hade on October 1, 2014 when Erwan Azizi, 32, emerged as a substantial shareholder with 19.05% stake or 20 million shares after buying 10.2 million shares in an off-market transaction at undisclosed prices. It is also reported that Erwan became Biosis Group non-independent, non-executive director on 14.11.2014. He is also executive director of Optimus Capital Sdn Bhd.

The Edge ACB: 66 at 67 mark as _____;

A29.4 The Plaintiff was appointed a director of Biosis Group Berhad on 30.11.2012 as an independent and non-executive director. He was re-designated as non-independent and non-executive Chairman on 25.4.2013, On 18.6.2013 the Plaintiff was redesignated as non-independent and non-executive Deputy Chairman of Biosis Group Bhd. The Plaintiff being designated as a non-independent director means he has acquired shares in Biosis Group Bhd or is representing someone who is a shareholder.

A29.5 I have checked the disclosures and announcements filed by Biosis Group Bhd to Bursa Malaysia over a period from the time the Plaintiff was first appointed to the Board to the most recent developments in the company. The company filings showed that over a short period of 6 months from October 2014 and March 2015, the deemed control of Biosis Group Bhd was changed drastically due to the entry of Erwan Azizi who owned 20 million shares by 1 October 2014 (representing 19.05% interest) and one Hamzarul Hazmir Hamdan who acquired 10 million shares on 16 January 2015 (representing 9.52% interest).

Hamzarul Hazmir Hamdan is a close business associate of the Plaintiff through a series of companies connected to the State of Perak namely YBU Holdings Sdn Bhd, Perumahan YBU Sdn Bhd and other companies related to the group. The Plaintiff was responsible for setting up and managing the YBU Group of Companies when the current Menteri Besar of Perak assumed the position in 2009. The Plaintiff was also formerly a Special Officer to the Menteri Besar of Perak.

On 30 March 2015, the Plaintiff bought 2 milion shares of Biosis Group Bhd representing 1.9% interest.

Based on this series of transactions, I can fairly conclude that the Plaintiff effectively control Biosis Group Bhd through the shareholding of Erwan Azizi (19.05%), his close business associate Hamzarul Hazmir Hamdan (9.52%) and himself (1.9%) — altogether a 30.47% holding in the company.

A29.6 Based on this, the involvement of Erwan Azizi in the acquisition of properties in MARA and his business venture in Biosis Group Bhd in which the Plaintiff can be assumed to have the effective control; cannot just be a pure co-incidence. I concluded that Erwan Azizi and the Plaintiff are actually close business associates.

Q30 I refer you to the last paragraph of the Impugn Statement at CB:20 can you explain the statement made therein by reference to Erwan Azizi, Izmir Abdul Hamid, Mazrul Haizad and Dazma Shah Daud?

A30 Erwan Azizi, Izmir Abdul Hamid and Mazrul Haizad Maarof are involved in the 4 property transactions which in summary are as follows:

A31.1 Erwan Azizi:

a. He is a director of Thrushcross;

b. He is not an employee of MARA Inc nor has any connection with MARA Inc;

c. He introduced Wanissa and the sale of Dudley House and 746 Swanton Street to MARA;

d. He held meetings to negotiate and communicated with Dennis Teen on the purchase of Dudley House first by Optimus then to bring in MARA to purchase in return for the AUD$4.75 million commission;

e. He is a director of Optimus which received the AUD$4.75 million kickback.

A31.2 Izmir Abdul Hamid:

a. He is a director of Thrushcross;

b. He is not an employee of MARA Inc nor has he any connection with MARA Inc;

A31.3 Mazrul Haizad bin Maarof:

a. He signed the letter of indemnity to cover Wanissa's tax liability for the AUD$4.75 million;

b. He is also a director and shareholder TRR Heritage Sdn Bhd and Leuven Capital Sdn Bhd, FRP Prestige Sdn Bhd is the former name of Leuven Capital Sdn Bhd;

SSM searches of TRR Heritage Sdn Bhd and Leuven Capital Sdn Bhd mark as _____;

A31.4 Dazma Shah Daud:

a. He held meetings to negotiate and communicated with Dennis Teen on the purchase of Dudley House first by Optimus then to bring in MARA to purchase in return for the AUD$4,75 million commission;

b. He is Mazrul Haizad bin Maarof's brother-in-law;

WHY THE PLAINTIFF'S NAME WAS MENTIONED IN THE PRESS RELEASE

[38] The defendant sought to justify the inclusion of the plaintiff's name in the paragraph referred to in the press release as follows:

Q32 What about the Plaintiff why is he included in the list of names in the paragraph?

A32.1 Those involved directly or indirectly are close to UMNO Youth leaders:

a. Erwan Azizi, Izmir Abdul Hamid, Mazrul Haizad Maarof are closed to or connected with Dazma Shah Daud, an UMNO Youth Exco member;

b. Erwan Azizi is close to or have dealings with the Plaintiff who is the Deputy UMMNO Youth chief;

c. Nazeem Abdul Rahman, the CEO of Pemodalan MARA Berhad who was named in the court transcript in Australia and played a pivotal role to represent MARA in the Dudley House transaction was a former employee of Mazrul Haizad Maarof;

A32.2 As everyone in Malaysia knows appointment to the board of directors of government linked companies ('GLCs') or subsidiaries of GLCs are made by the Federal Government but in practice it is by the Barisan Nasional or more accurately by UMNO. The UMNO Youth leadership have constantly and repeatedly been calling for then members to be appointed onto the board of GLCs and its subsidiaries. UMNO Youth members cannot have been appointed to the position of directors in MARA Inc. or its subsidiaries or other GLCs without the recommendation and approval of senior UMNO Youth leaders such as the Plaintiff.

A32.3 Since both Erwan Azizi and Izmir Abdul Hamid are not MARA employees, their appointment as directors of Thrushcross, a MARA subsidiary can only have been made on the recommendation of the UMNO Youth Chief or by the Plaintiff as Deputy Chief of UMNO Youth.

A32.4 Similarly, the appointment of Nazim Abdul Rahman as the CEO of Permodalan MARA Berhad cannot be made by a junior UMNO politician. Given that the Plaintiff is a close business associate of Erwan Azizi and Erwan Azizi is a close business associate of Mazrul Plaizad Maarof who in turn is the brother in law of Dazma Shah Daud (who is an UMNO Youth EXCO), I can conclude that the Plaintiff know the people named in the court transcripts and his relationship with them is a lot closer than he cares to admit officially. I concluded that it was reasonable and probable that Nazim Abdul Rahman's appointment as the CEO of Pelaburan MARA Berhad was upon the Plaintiff's recommendation.

Q33 Why did you mention the Plaintiff in the Impugn Statement?

A33 There are several matters in these transactions for which the Plaintiff as Deputy Youth Chief has to come forward and explain:

a. The Plaintiff as Deputy Chief of UMNO Youth must explain the role Erwan Azizi played in the Dudley House and Swanston Street purchase;

b. The Plaintiff as Deputy Chief of UMNO Youth has to explain how Erwan Azizi came to be appointed onto the Board of Thrushcross;

c. The Plaintiff as Deputy Chief of UMNO Youth has to explain how Erwan got to be appointed when there is an obvious conflict of interest in Erwan Azizi's appointment to the MARA subsidiary which is purchasing Dudley House since Erwan Azizi is the son of Dato Azizi who is an investor of Wanissa;

d. The conflict of interest becomes more critical when it is clear from a simple checking in the internet that MARA was paying more than the market price for the properties and therefore there is something very wrong with the due diligence undertaken by Thrushcross;

e. The Plaintiff as Deputy Chief of UMNO Youth must also explain the purchase by Erwan Azizi of 19.5% equity amounting to 20 million shares in Biosis Group Berhad and the subsequent acquisitions by his close associate Hamzarul Hazmir Hamdan and himself that made the Plaintiff effectively in control of the company;

f. Mazrul Haizad bin Maarof is obviously involved in receiving the payment of AUD$4.75 million because he issued the letter of indemnity to Dennis Teen;

g. The Plaintiff as Deputy Chief of UMNO Youth has to explain the involvement of UMNO Youth since Mazrul is Dazma Shah Daud's brother-in-law;

Q34 What is the relationship between Mazrul Haizad Maarof and the Plaintiff?

A34 Mazrul Haizad Maarof is an associate of the Plaintiff by way of the former's business partnership with Erwan Azizi who is a close business associate of the Plaintiff. They belong to the same circle of politician-businessmen who look after each other with Mazrul Haizad Maarof acting as the front or proxies to the politicians.

[39] In so far as the plaintiff's involvement in the property transaction was concerned, the defendant said that he did not suggest that the plaintiff was direcdy involved in the property transactions. His explanation as regards the plaintiff position in the narrative of the property transaction was as follows:

Q35 The Plaintiff claims the words in the Impugned paragraphs ('the Impugn Words') you published questioned the Plaintiff's involvement in the transactions, what have you to say to this allegation?

A35.1 I did not say the Plaintiff was involved directly in the transactions as he was not named in the court transcripts. It was not written as clearly as I would have liked, however upon reading the last paragraph with the 6th bullet paragraph and reading the words in the context of the entire Impugn Statement and the earlier Press Statements, the Impugn Words did not mean the Plaintiff was involved directly in the transactions;

A35.2 On reading the entire Impugn Statement and the earlier Press Statements, the Impugn Words meant that the Plaintiff is asked to explain the leakage based on his relationship with Erwan who was directly involved in the transactions;

A35.3 The Plaintiff also has to explain the clear business association he has with Erwan which could have led the public to believe that he was influential in the transactions because only a politician of his stature and ranking could have placed Erwan on the board of Thrushcross;

Q36 The Plaintiff claims that the Impugn Words meant Thrushcross suffered leakages of RM63 million. What have you to say about this allegation?

A36.1 Based on the facts that I have said earlier in this witness statement MARA through Thrushcross suffered losses and leakages of more than RM63 million in the purchased of the four properties above market price.

Q37 What do you have to say about the Impugn Words?

A37 The Impugn Words is a fair comment based on the Plaintiff's relationship with Erwan Azizi and Erwan Azizi's role in the entire episode on MARA's purchase of the four properties;

Q38 The Plaintiff claims that the Impugn Words were republished although not in precisely the same words. What have you to say to this allegation?

A38 The Impugn Words in the Press Statement dated 7.7.2015 were provided to the reporters that attended the press conference. However, I realized that it was not as clearly worded as I would have liked. Therefore I did not read the last paragraph at CB:20. I thereafter corrected the said paragraph which I uploaded on my blog on 9.7.2015 which states 'Ada ketirisan sebanyak RM63 juta yang perlu dijawab oleh individu-individu yang saya namakan pad a hari ini iaitu Erwan Azizi, Izmir Abdul Hamid dan Mazrul Haizad Maarof yang merupakan individu yang rapat dengan pemegang jawatan Pemuda Umno ia itu Dazma Shah Daud dan Khairul Azwan Haron'.

WHETHER THE IMPUGNED WORDS BEAR A DEFAMATORY MEANING

[40] I turn now to the most basic issue in this case and that is whether the impugned words have a defamatory meaning of and concerning the plaintiff. It is trite that the primary question that has to be answered in any defamation action is whether or not the impugned words are capable of bearing a defamatory meaning and whether they are in fact defamatory of the claimant.

[41] There are several judicial formulations for the approach to be taken by the courts when dealing with this primary question and they are seen from the following cases. In this regard, the Court of Appeal in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371, took the opportunity to discuss the point and at pp 374–375 at para E-E held as follows:

> It cannot, I think, be doubted that the first task of a court, in an action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.
>
> ...

Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for a court to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent upon the circumstances of the particular case.

[42] In terms of determining the meaning of the impugned words I consider the case of *Jeynes v News Magazines Ltd and another* [2008] EWCA Civ 130 at paras 14–15) to be highly instructive as it sets out all the relevant permutations and parameters which are necessary for this imperative curial task, I have set out paras 14–15 of the judgment which reads as:

[14] The legal principles relevant to meaning have been summarised many times and are not in dispute. With some slight embellishment, made in the light of Mr Davies' submissions, I can take them from Mr Caldecott's skeleton argument. They are derived from a number of cases including, notably, *Skuse v Granada Television Limited* [1996] EMLR 278, per Sir Thomas Bingham MR at pp 285–7. They may be summarised in this way: (1) The governing principle is *reasonableness*.

The *hypothetical reasonable reader is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided.* (4) The intention of the publisher is irrelevant. (5) *The article must be read as a whole, and any 'bane and antidote' taken together.* (6) The hypothetical reader is taken to be representative of those who would read the publication in question.

In delimiting the range of permissible defamatory meanings, *the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …'* (see Eady J in *Gillick v Brook Advisory Centres approved by this court* [2001] EWCA Civ 1263 at para 7 and *Gatley on Libel and Slander* (10th Ed), para 30.6). (8) It follows that 'it is not enough to say that by some person or another the words *might* be understood in a defamatory sense'. *Neville v Fine Arts Company* [1897] AC 68 per Lord Halsbury LC at p 73.

[15] Those are the principles applicable to the determination of meaning at a trial and thus in a jury trial by the jury. As I said earlier, on an application of this kind, it is common ground that the question is whether the words complained of are capable of the meaning or meanings complained of. Put another way, *the question is whether it would be perverse to conclude that the words bear the alleged meaning or meanings.* (Emphasis added.)

[43] It has also been said that the approach to be adopted in determining the meaning of the impugned words is that the judge must ask himself what overall impression the material had made on him and to then check that impression against the detailed textual arguments put forward by the parties: per Sir David Eady in *Johnston v League Publications Ltd* [2014] EWHC 874 (QB) at paras 3–4.

[44] In Singapore, the Court of Appeal has enunciated that the court is entitled to determine the meaning of the impugned words and is not limited to the meanings which either the plaintiff or the defendant seeks to place on them (see: *Oei Hong Leong v Ban Song Long David and Others* [2005] SGCA 35 at para 23). However, although the judge is not confined to the precise meanings advanced by the parties and may find the words bear some different meanings, the judge should not normally make a finding of any meaning which is not either advanced to some extent in the pleadings or submissions of one or other party, or within the same class or range as a meaning is advanced (see: *Tim Yeo MP v Times Newspapers Limited* [2014] EWHC 2853 (QB) at para 82).

[45] I had earlier referred to the case of *Chase v Newsgroup Newspapers Ltd* [2002] EWCA Civ 1772 ('Chase'), which recognises different levels of meaning which correspondingly calls for different levels of justification. The principles enunciated in *Chase* were approved by the Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kim Wee* [2015] 6 MLJ 187. In para 48 of the judgment of the Federal Court, the *Chase* principle was cited. The relevant passage (from *Chase*) which explains that there could be three different categories of meaning for the defence of justification is as follows:

> The sting of a libel may be capable of meaning that a *claimant has in fact committed some serious act*, such as murder. Alternatively, it may be suggested that the words mean that *there are reasonable grounds to suspect that he/she has committed such an act*. A third possibility is that they may mean that *there are grounds for investigating whether he/she has been responsible for such an act.* (Emphasis added.)

[46] In the present case, it was contended for the defendant that the plaintiff's meanings are not valid as the meanings proceed on the basis that the impugned words bear either a *Chase* level 1 or level 2 meaning. The defendant says that the plaintiff has read too much into the impugned words. As far as the defendant was concerned, there is no imputation bearing a *Chase* level 1 or 2 meaning expressed or that can reasonably be inferred from the impugned words. Elaborating on why there is no *Chase* level 1 or 2 meaning, counsel for the defendant submitted as follows. He said, the first paragraph of the impugned words is a statement of fact. This statement is true in so far as the plaintiff is concerned by reason of the plaintiff's admission to para 3 of the impugned words and the plaintiff has admitted there is no reference to the plaintiff in the first paragraph (see notes of proceedings ('NOP') at pp 124–125 — 'Erwan Azizi dan Izmir Abdul Hamid adalah rakan kongsi yang mempunyai banyak kepentingan perniagaan dengan pimpinan UMNO dan Pemuda UMNO' ('impugned para 1').

[47] Next, counsel submitted that the second paragraph is a statement of fact which is true from searches conducted at the Suruhanjaya Syarikat Malaysia and from documents. There is also no reference to the plaintiff or any

imputation made against him in the second paragraph.

[48] The plaintiff admits to the accuracy of this paragraph (see: NOP p 129) – 'Erwan Azizi adalah Pengarah Eksekutif Optimus Capital Sdn Bhd (sila rujuk laporan *The Edge* mengenai pemilikan saham beliau). Selain beliau pengarah dan pemegang saham Optimus Capital Sdn Bhd yang lain adalah seorang yang bernama Mazrul Haizad Maarof (rujuk carian SSM yang disertakan bersama) Individu ini (Mazrul Haizad Maarof) adalah abang ipar kepada Dazma Shah Daud, Exco Pemuda UMNO' ('impugned para 2').

[49] Counsel for the defendant emphasised that the plaintiff had admitted that the third paragraph is true (see: NOP p 129). There is no imputation against the plaintiff in impugned para 3 — 'Erwan Azizi juga adalah pengarah bukan eksekutif Biosis Group Berhad yang dipengerusikan oleh Khairul Azwan Harun, Naib Ketua Pemuda UMNO Malaysia' ('impugned para 3').

[50] In so far as the fourth paragraph was concerned, counsel submitted that it is a *comment*. The plaintiff's objection to the fourth paragraph is the words 'yang perlu dijawab' (see: NOP p 132) — 'Seperti yang telah dilaporkan minggu lepas, hartanah ini dijual pada harga AUD$23.5 juta seperti rekod di Australia tetapi jumlah yang diluluskan oleh MARA adalah AUD$41.8 juta (bersamaan RM138.6 juta). Ada ketirisan sebanyak RM63 juta *yang perlu dijawab oleh individu-individu yang saya namakan pada hari ini iaitu Erwan Azizi, Izmir Abdul Hamid, Mazrul Haizad Maarof, Dazma Shah Daud dan Khairul Azwan Haron* yang semuanya adalah sama pemegang jawatan Pemuda Umno atau pun individu yang rapat dengan mereka' ('impugned para 4').

[51] It was submitted that when read in its proper context, the words 'yang perlu dijawab' is not an imputation that the plaintiff is guilty of wrongdoing (*Chase* level 1 meaning) or there is reasonable ground of suspecting him of having committed any wrongdoing *(Chase* level 2 meaning). Counsel said that the hypothetical reader being a fair-minded person who is not avid for scandal would have the impression that there is only cause for an explanation or there is cause for investigation *(Chase* level 3 meaning).

[52] It was argued for the defendant that the fifth paragraph of the impugned words is also a comment. Here, the plaintiff had admitted that there is no reference to him (see: NOP p 132) — 'Siasatan dan tindakan yang diambil ke atas individu-individu yang terbabit di dalam skandal MARA ini mestilah juga membabitkan mereka yang berada di belakang tabir yang bertindak sebagai pengatur atau *broker* kepada urusniaga yang merugikan MARA ini' ('impugned para 5').

[53] It was argued therefore that by the word 'siasatan', the imputation is

limited to there being grounds for an investigation. Hence, counsel submitted that the meaning of impugned para 5 cannot be any level of seriousness higher than a *Chase* level 3 meaning.

[54] It was emphasised that there is also no reference to the plaintiff in the sixth paragraph, In this regard, the plaintiff had conceded in cross-examination that his name does not appear in the impugned para 6, which reads, (see: NOP pp 132–133), — 'Saudara Khairy Jamaluddin perlu tampil kehadapan memberi penjelasan bagaimana individu-individu yang berkaitan dengan pimpinan Pemuda Umno telah terlibat dan berkait dengan skandal ini' ('impugned para 6'). Counsel argued that the words 'tampil kehadapan memberi penjelasan' means there are grounds for an investigation or for an explanation to be given. Hence, it was contended that they cannot bear a meaning more serious than that. The natural meaning is that there may or may not be any wrongdoing depending on the answer to be given or results of the investigation. There is no imputation of either a *Chase* level 1 or 2 meaning. As such, it was submitted that the interpretations that were given by the plaintiff as per sub-paras 9.4 and 9.5 of the statement of claim is based on a perverse reading of the impugned words because there is no allegation that the plaintiff had abused his position as Biosis Chairman or any reference to his business transactions in Biosis.

[55] Still on the same point, counsel argued that the plaintiff's contentions in sub-paras 9.1, 9.2, 9.3, 9.6, 9.7 and 9.8 of the statement of claim in attempting to interpret the words 'perlu dijawab' in the impugned para 4, 'siasatan' in impugned para 5 and 'perlu tampil kehadapan memberi penjelasan' to mean that the plaintiff is guilty of wrongdoing with certitude is a forced and unreasonable interpretation of these words.

[56] Counsel for the defendant said that the meanings as contended by the plaintiff requires the plaintiff to jump over two fences in one stride which Lord Devlin said in *Lewis and another v Daily Telegraph Ltd* [1963] 2 All ER 151 at pp 173–174; [1964] AC 234 at pp 285–286 is impossible. In that case, it was said that a statement that there are grounds for an inquiry cannot convey an impression of guilt. Lord Devlin said:

> Let it be supposed, first, that a statement that there is an inquiry conveys an impression of suspicion; and secondly, that a statement of suspicion conveys an impression of guilt. It does not follow from these two suppositions that a statement there is an inquiry conveys an impression of guilt. For that, two fences have to be taken instead of one ... I do not think it could take the second in the same stride. If the ordinary sensible man was capable of thinking that wherever there was a police inquiry there was guilt, it would be almost impossible to give accurate information about anything: but in my opinion he is not.

[57] Hence, it was submitted for the defendant that based upon the ordinary and natural meaning of the impugned words, the sting of the imputation is that there are grounds to investigate or for an inquiry or cause for an explanation to be given by the plaintiff of his involvement, his relationship with Erwan and the other connected persons in the property transactions.

THE DEFENCE OF JUSTIFICATION

[58] The traditional approach to the defence of justification is seen from the case of *Workers' Party: Tay Boon Too; Workers' Party v Attorney-General* [1975] 1 MLJ 47 at p 51 para j, where it was enunciated that to establish a plea of justification, the defendant must:

(a) prove the defamatory imputation is true;

(b) justify the precise imputation complained of; and

(c) prove the truth of all material statements in the libel.

[59] In *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242 at p 252; [2014] 3 CLJ 560 at pp 573–574 the Court of Appeal explained the burden that has to be discharged in proving justification and said:

> Again, perhaps we should go back to what in essence is required to be established by a defendant who is desirous of putting up a defence of justification in facing up a defamation suit. In relying on the defence of justification the burden of proof is on the defendant to prove that the allegations made are true or are substantially true. The defendant must prove it on the balance of probabilities, that is, the allegation is more likely than not to be true.
>
> For example, an allegation published by repeating a rumour cannot be justified by proving that there was such a rumour. A defendant is required to prove the substance of the allegation. Since the burden of proving the truth of an allegation is on the defendant, claimants enjoy a distinct advantage in defamation claims. Justification has to be used with great care. It can often be difficult to obtain sufficient admissible evidence to persuade the judge that the statement is true. This will sometimes result in the media being unable to publish allegations which are generally believed to be true, but which they may not be able to prove to the standard required in court. Further, an unsuccessful defence of justification is likely to increase the level of any damages awarded.

[60] In the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 at pp 177–178; [1988] 1 CLJ Rep 233 at pp 240–241, it was held that the burden was on the defendant to prove that the defamatory words contained in the fourth letter was true.

[61] In that case, the defendant did not discharge his burden of proving that

there was justification in making those statements. It was held as follows:

> The burden lies upon the defendant to establish justification. The burden does not lie on the plaintiff to prove that the defamatory words are false, because the law presumes this in his favour: *Bett v Lawes* (1882) 51 LJQB 359 at p 361. To establish justification the defendant must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation was true; *Peters v Brodlaugh* [1884] 4 TLR 467. At the trial of this action the appellant did not make a serious attempt to prove justification. On the contrary, at the end of his examination-in-chief he stated: 'I still do not know where all the money is'. So his plea of justification fails.

[62] However, counsel for the defendant relied on the decision of the Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187 paras 45–51 which applied the legal principle that a defendant is entitled to plead justification to what is known as a *Lucas-Box* meaning, that is to say, the plea of justification by proving the defendant's own reasonable meaning to the impugned words.

[63] As mentioned earlier, the Federal Court also accepted and applied the principles in *Chase* that there are three levels of seriousness to the meaning of an imputation for which distinct and different levels or quantum of proof is required for each level of meaning.

[64] In *Tony Pua's* case the Federal Court held that the impugned words 'reasonable suggestion' in that case fell within the lowest limb in *Chase* that 'there are grounds for investigating whether he/she has been responsible for such an act'. These principles are succinctly explained in *Gatley on Libel and Slander* (12th Ed) para 11.13 and *Carter-Ruck on Libel and Slander* (6th Ed) paras 9.10, 9.11 and 9.12 pp 184–186.

[65] It was submitted that the principle of law that were enunciated in cases such as *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ 771 must be read in the light of the Federal Court decision in *Tony Pua* and the recent jurisprudence relating to the incremental development of the law on justification as laid down in *Chase*.

[66] According to the defendant, the plaintiff is wrong to suggest that the defendant is obliged to justify the impugned words on the basis of *Chase* level 2 and 3 meanings. In this regard, the plaintiff took the position that the defendant must plead and prove that there is conduct by the plaintiff that raises grounds for suspicion. In response, the defendant maintains that his *Lucas-Box* meaning is a *Chase* level 3 meaning and the 'conduct rule' applies only to *Chase* level 2 meaning but not to a *Chase* level 3 meaning.

[67] It was submitted that there are real legal and distinct distinguishing features between *Chase* level 2 and 3 meanings which necessitates different approaches and requirements of proof. In terms of the approach to proof of the defence of truth in *Chase* level 2 'reasonable grounds to suspect cases' counsel for the defendant referred to the judgment of Eady J in *Musa King v Telegraph Group Ltd* [2003] EWHC 1312 (QB) at para 32 which was approved on appeal by the Court of Appeal at *King v Telegraph Group Limited* [2004] EWCA Civ 613 at paras 21–23 where it was enunciated that where the nature of the plea is a *Chase* level 2 meaning of 'reasonable grounds to suspect', it is necessary to prove primary facts and matters giving reasonable grounds of suspicion objectively judged. Generally, it is necessary to plead allegations of facts tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion. This is the so-called 'conduct rule'. The rule is not absolute, and strong circumstantial evidence can contribute to reasonable grounds for suspicion. Where the meaning is merely that grounds exist for investigating the plaintiff's conduct, a *Chase* level 3 meaning, the English High Court in *Jameel and another v Times Newspapers Limited* [2003] EWHC 2609 (QB) at paras 22–30 held that due to the real distinguishing features between a *Chase* level 2 and level 3 meanings, the conduct rule and the repetition rule do not apply to a justification of a *Chase* level 3 meaning. Further, the first distinguishing feature is the imputation that there exists reasonable ground for suspicion of misconduct, generally arises because the person suspected has acted in such a way to bring suspicion on himself.

[68] Next, the second distinguishing feature is that sufficient grounds may exist for an enquiry or investigation in circumstances where the information available is incomplete and where it may comprise or consist in hearsay arguments. In the *Musa King*'s case, the court took a mundane example and said that a police officer to whom a complaint is made may justifiably conclude that further investigation into that complaint is required even if it is based exclusively on hearsay evidence. Hence, based on the above two distinguishing features the conduct rule does not apply because grounds may exist independently of any incriminating conduct by the individual concerned that require an enquiry or investigation. It was also explained that based upon the same distinguishing features, the High Court judge held the repetition rule does not apply to justification of a *Chase* level 3 meaning since grounds for enquiry or investigation do not have to be shown to be 'objectively reasonable', as the point of the investigation is to discover whether they are so. Hence, hearsay statements may in a suitable case, be relied on. The English Court of Appeal in *Jameel and another v Times Newspapers Limited* [2004] EWCA Civ 983 at para 23 approved the High Court decision that there are real legal and distinct features between *Chase* level 2 and 3 meanings. However, Sedley J said although there are defensible theoretical reasons why the repetition rule should not apply to a *Chase* level 3 imputation there are also practical reasons why fire repetition rule should apply. The point, however, was not argued at the appeal

and therefore the High Court decision stands — *Jameel and another v Times Newspapers Limited* [2004] EWCA Civ 983 at paras 27–30.

[69] In conclusion, it was submitted that the defendant has substantially justified the truth of the *Lucas-Box* meaning of the impugned words. Based on the principles in *Jameel*'s case, it was argued that there is no requirement for the defendant to plead and prove the plaintiff's conduct because the defendant is not seeking to justify a *Chase* level 2 meaning and hearsay evidence is therefore allowed. It was submitted that in this case there is strong evidence to prove the defendant's *Chase* level 3 meaning, (see paras 15–24 of the written submission filed on behalf of the defendant). Therefore it was submitted that the defendant is not required to prove that the plaintiff had committed the alleged wrongdoing, The defendant contends that the sting in the impugned words is th at there are grounds for an investigation or for the plaintiff to give an explanation of his involvement in the property transactions, his relationship with the connected persons who were involved in the property transactions. Thus the defendant seeks to justify a different meaning from the plaintiff's meaning of the impugned words (see *Lucas-Box v Associated Newspapers Group plc and others* [1986] 1 All ER 177 at p 183; *Lee Kuan Yew v Derek Gywn Davies & Ors* [1990] 1 MLJ 390 at pp 402–403; *Mirzan bin Mahathir v Star Papyrus Sdn Bhd* [2000] 6 MLJ 29 at pp 36D and 37H).

JUSTIFICATION OF THE STING

[70] In so far as justification of the sting was concerned, counsel pointed to the following facts as forming the basis for the plea of justification. He pointed out that it is true and not disputed or credibly denied that MARA overpaid RM129m. He said that it is also true that the MARA Chairman, Tan Sri Anuar Musa went to Australia for a briefing after news of the property transactions broke out in the Australian media. He said that the property transactions were all done via a complicated corporate structure and therefore it is true that instead of MARA Inc directly entering into the property transactions, a complicated corporate structure consisting of several layers of foreign and offshore companies was used which made it easier for the impropriety to take place.

[71] In so far as the involvement of non-MARA directors in the property transaction is concerned, counsel said that it is true that Erwan and Izmir both of whom have no connection with MARA and are not UMNO members, were appointed as Thrushcross Directors. He said that they would need the recommendation or endorsement of a person with sufficient political influence to be appointed to a MARA subsidiary.

[72] I turn now to the sum of AUD$4.75m that was paid to three

companies. Here, counsel for the defendant referred to the Australian court transcript which showed that the Directors of Wanissa wanted to sell Dudley House at the market price of AUD$17.8m but an additional AUD$4.75m was added to the purchase price such that MARA ended up paying AUD$22.6m. This additional AUD$4.75m was paid as 'kickbacks' to three companies, Leuven Capital Sdn Bhd, Optimus Capital Group of Companies Sdn Bhd and TRR Heritage Sdn Bhd. Mazrul signed a letter to indemnify the Wanissa Directors for the tax liability on the AUD$4.75m. There is in existence the following documents: a letter of indemnity from Mazrul to Teen Boon Lye ('Dennis Teen') dated 24 July 2013 (B2: 103–104), TRR Heritage invoices (B2: 105), 106, Optimus invoices (B2: 107 and 111), FRP Prestige invoice (B2: 108) and Leuven Capital invoices (B2: 109 and 110). The reference to these invoices are set out in the following pages of the Australian court transcript: TRR Heritage invoice (B4: 352 line 12–19, 353 line 3–8); FRP Prestige invoice (B4: 353 line 11–15); Leuven Capital invoice (B4: 354 line 26–27) and Optimus Capital Group of Companies invoice (B4: 355 line 7–9).

[73] As for the hot topic of kick backs, counsel submitted that the money that was paid to the three Malaysian companies were 'kickbacks'. Here, it was pointed out that the Wanissa Finance Manager and Directors said the money was paid as 'kickbacks' or to 'grease palms' (B4: 69 line 24–28, 70 line 6–8, 73 line 2–22, 75 line 18–24, 76 line 20–27, B4: 118 line 19–30, 171 line 17–24, 172 line 19–31, 173 line 20–29). The tax indemnity was to cover the AUDK75m 'kickbacks' (B4: 171 line 17–24, 172 line 1–18, 355 line 29–31, 356 line 1–14, 360 line 15–16). MARA borrowed AUD$22.6m for which Wanissa received AUDI 17.8m and the rest of the money was paid to the Optimus group of people (see paras A22.1–22.4 DWL21–28; B4:349 line 14–31).

[74] As for the direct involvement of Erwan and Mazrul in kickbacks; reference was made to the testimony of Dennis Teen who testified that he met Dazma, Ezad, Erwan and four or five people many times over many trips including three or four times in Malaysia (see: para A22.4(c), (e), (k) and (q); DW1: 23, 24, 25 and 27. Transcript B4: 323 lines 23–29). Erwan was a director of Thrushcross and a director and shareholder of Optimus which received part of the AUD$4.75m kickback (see paras A31.1, 31.2, 31.3 and 31.4; DW33–35). Mazrul is a director and shareholder of Optimus Capital and TRR Heritage Sdn Bhd. He is a director of Leuven Capital Sdn Bhd (former name is FRP Prestige Sdn Bhd). Although Mazrul is a director of Leuven Capital Sdn Bhd, he is not a shareholder.

[75] The ultimate shareholder of Leuven Capital is Creek Consulting which is the substantial shareholder of Leuven Group, a Labuan offshore company and the identity of its shareholders cannot be obtained due to its offshore

nature. Erwan is a director of Optimus Capital (*The Edge* article B2: 66 and 67); (see SSM search of Optimus Group of Companies (B: 13–18); SSM search of TRR Heritage (B5: 13–19); SSM search of Leuven Capital (B5: 7–12); SSM search of Leuven Group Sdn Bhd (B5: 1–6).

[76] I turn now to Erwan's shareholding in Biosis. In this regard, counsel for the defendant said that the first ground to justify the sting is Erwan's acquisition of 20 million shares in Biosis amounting to 19.5% of its paid-up capital. He said that the only reasonable inference that can be drawn from this share acquisition is that the money that was used for the purchase of these 20 million Biosis shares is from the kickback and belongs to the plaintiff or are for the plaintiff's use and benefit. He elaborated further as follows:

(a) there is no good commercial or prudent investment reason for Erwan to purchase 20 million Biosis shares on 1 October 2014 because either 90% of the share value would be cancelled if a proposed regularisation plan is approved or if not, then the company will be delisted from Bursa Malaysia;

(b) Biosis was in financial difficulties in June 2013. On 26 June 2013 it announced to Bursa Malaysia that it was a PN17 company. Being a PN17 company, Biosis submitted and announced a regularisation plan which included a capital reduction exercise to cancel 0.45 cent for every 0.50 cent par value of its shares. If the regularisation plan is not approved Biosis will be delisted and if it is approved the shareholders are going to have their shares reduced by 90% in value. It does not make commercial sense for Erwan to purchase 20 million shares after the announcement of the regularisation plan incorporating the capital reduction exercise;

(c) it was contended that Erwan's share purchase is for the plaintiff's benefit because the plaintiff will in the end take over control of Biosis but without Erwan, Erwan, who upon acquiring the 20 million shares is the single largest shareholder will not take over control of Biosis or even share control with the plaintiff in the end (NOP: 171);

(d) no ordinary or prudent person will purchase 20 million shares to be the single largest shareholder, knowing 90% of its value will be cancelled and for control of the company to be taken over by someone else;

(e) there is thus ground to investigate the plaintiff or for him to explain since the 20 million shares ultimately benefits the plaintiff and not Erwan; and

(f) as for Erwan's directorship in Biosis, there is no dispute that the plaintiff as Biosis chairman and member of the Audit Committee and Nomination Committee, appointed Erwan and did not remove him as director even after knowing his involvement in the property transactions. Hence, it was submitted that it is highly unusual for Biosis as a PN17 company seeking Bursa Malaysia's approval for its regularisation plan and

funding from financiers which is critical to the regularisation plan's success, to appoint Erwan as a director and to continue his appointment in the light of his involvement in the property transactions and in Optimus Capital.

[77] The next issue was the source of the plaintiff's funding in 2013. This was the second ground for the justification of the sting:

(a) the plaintiff was able to fund the purchase of very substantial share purchases and expenditure at about the same time or soon after the AUD$4.75m was paid by Wanissa to the three companies;

(b) the invoices for the kickback are dated 17 January 2013, 5 February 2013, 31 March 2013 and 26 April 2013. The letter of indemnity is dated 24 July 2013. Therefore the money was paid on or about these dates. The plaintiff acquired 7,213,000 shares in Ideal Jacobs (M) Corp Bhd in 2013.The plaintiff acquired 2,000,000 Biosis shares on 30 March 2015. The plaintiff incurred substantial expenditure for his campaign during this time for the post of UMNO Youth Vice-Chief which entails campaigning in 191 divisions throughout Malaysia. The plaintiff could not have obtained the substantial amounts from his salary and regular sources of income (see SSM search — the plaintiff's Ideal Jacobs (M) Corporation Bhd shareholding acquired in 2013 (B3:15 at p 19) (NOP: 152), plaintiff's purchase of Biosis shares (B6: Tab 9), plaintiff's campaign for the 2013 party election (NOP: 153–155)). At all times, the plaintiff was a salaried employee. Thus, he could not have acquired the funds from his monthly salary of RM1,500 as an accountant in Ernst & Young from 1999–2004, monthly salary of RM15,000 in the Perak Government civil service from 2004, as Chief of Staff to the Perak Chief Minister from 2009 and then CEO of Yayasan Bina Upaya Darul Ridzuan from 2010–2011; and

(c) he also could not have obtained the funds from his shareholding in his companies because they were suffering losses. Great Colour Holdings Sdn Bhd according to the SSM search as pet 31 December 2012 financial position shows negative reserves of RM14,919 and losses of RM9,839. Teknologika Serumpun Sdn Bhd has not filed its audited financial statements with the SSM. Mexter Technology Bhd according to its 31 December 2014 financial statements has negative reserves of RM8,659,000 and losses after tax of RM1,263 (see Ernest & Young salary (NOP: 148), CEO Yayasan Bina Upaya Darul Ridzuan salary (NOP: 149), Chief of Staff Perak Chief Minister (NOP: 150), SSM search Great Colour Holdings Sdn Bhd (B3:3 at p 8), SSM search Teknolgika Serumpun Sdn Bhd (B3:9 at p 14), SSM search Mexter Technology Bhd (B3:23 at p 30)).

[78] The next point that was touched on was the plaintiff's political influence. This was the third ground for the justification. Here, it was submitted that the plaintiff possesses the necessary influence to cause Erwan and Izmir to be appointed as Thrushcross Directors and is close to the decision makers to push for the property transactions.

[79] There is a close connection between the people involved in the kickback, Erwan and Mazrul with UMNO Youth leaders, namely the plaintiff and UMNO Youth Exco member Dazma Shah Daud. The defendant said in his witness statement that due to the dynamics and mechanics of patronage in UMNO, Erwan and Mazrul are the front for the property transactions and they could only have had access to the decisions makers in MYRA because they are connected to UMNO politicians with a certain clout and influence. Dennis Teen also testified Erwan and Mazrul are close to the people who have an influence with the decisions makers. The plaintiff said Datuk Seri Hishamuddin is his mentor (see: NOP p 156). As Chief of Staff to the Chief Minister of Perak he was in charge of the administration and management of the Perak Chief Minister's office including the scheduling of appointments and meetings for the Chief Minister (NOP p 150). The plaintiff was the Chief Minister's gate-keeper. This provided the plaintiff access to influential senior political leaders. The plaintiff was appointed to the UMNO Supreme Council because he is well-acquainted with senior UMNO leaders (see NOP p 155). Reference was made to the defendants statement (para A29.1 DW1: 30–31), where he quoted Dennis Teen testimony: 'Ezad (Mazrul) is the contact person for MARA ... We do not know the MARA people, as far as the push at the top end. Those people like Zainel and Nazim's are just staff of MARA. So Ezad is the key man with the decision makers. So, obviously, we have to get the guy that is in direct contact with the right people to push for an answer' (see Bundle B4: 342 lines 1–7).

[80] As such, it was submitted that there are grounds to commence investigation and that the above grounds taken cumulatively satisfy the requirements of a reasonable suspicion to commence an investigation. It is not necessary for prima facie evidence to be obtained to start an investigation, conjecture and surmise is enough (see: *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 at p 221 (PC)). It is also sufficient cause for the plaintiff to give an explanation. As such, it was contended that the defendant has justified the sting of the impugned words.

FAIR COMMENT

[81] As for the defence of fair comment, it was submitted that the right of fair comment is one of the fundamental rights of free speech and is of vital importance to the rule of law on which we depend for our personal freedom

(*Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (CA) at p 170). In this regard, it is said that in a society which greatly values the freedom of speech and safeguards it by constitutional guarantee, it is right that the courts when considering and developing the common law should not adopt a narrow approach to the defence. The courts should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigour. *Cheng Albert v Tse Wai Chun Paul* [2000] 4 HKC 1, Li CJ at p 6E-G.

[82] The defendant maintains that he has satisfied the elements for the defence of fair comment. He said the words complained of are comment and the comment is based on true facts and the comment or opinion that was expressed, was fair. Lastly, the comment must be a matter of public interest. *Gwee Tong Hiang v Boo Cheng Han* [2016] 2 MLJ 388 (CA) at para 23; *Cheng Albert v Tse Wai Chun Paul* [2000] 4 HKC 1 at pp 8–9; *Spiller v Joseph* [2010] UKSC 53 at para 3.

[83] It was submitted that the impugned paras 4–6 are comments whereas the impugned paras 1–3 are statements of fact which the defendant has proven to be true and/or admitted by the plaintiff to be true. Applying the objective test of the ordinary reader and that a comment is something 'which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark or observation', impugned paras 4–6 are comments (*Gwee Tong Hiang v Boo Cheng Hau* [2016] 2 MLJ 388 (CA) at para 24), *Branson v Bower* [2001] EWCA Civ 791).

[84] As for the requirement that the comment must be fair, it was submitted that the impugned paragraphs are comments that a 'fair' or 'honest-minded' Malaysian could hold. The comments meet the objective test laid down in *Spiller v Joseph* [2010] UKSC 53. 'Fair' in respect of this element does not mean that which the ordinary reasonable man would think.

[85] Still less does the test require the judge to agree with the comment. All that is required is that the comment must be one that any man, 'however exaggerated, obstinate or prejudiced' could honestly hold. It is no part of the defendant's burden to prove that he honestly held the opinion. Where the comment is fair by an objective standard, it is presumed to be an honest expression of the defendant's view unless the claimant established malice. The case that was referred to on this point was *Telnikoff v Matusevitch* [1991] 4 All ER 817 (HL) where Lord Ackner at pp 826–827 speaking on the importance of the defence of fair comment in terms of advancing the speech and democracy, said:

> My Lords, Your Lordships are once more concerned with one of the fundamental freedoms — the freedom of speech. This appeal concerns the plea of fair comment — the right of the citizen honestly to express his genuine opinion on a subject of

public interest, however wrong or exaggerated or prejudiced that opinion may be. There have been many judicial pronouncements on how vital to the functioning of a democratic society is the freedom to comment on matters of public interest. I content myself with citations from two cases.

In *Lyon and Another v The Daily Telegraph, Limited* [1943] KB 746, a decision of the Court of Appeal to which I will have occasion again to refer, Scott LJ said, at p 752:

> the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements.

Towards the end of his judgment Scott LJ added, at p 753:

> It (the right of fair comment) is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom that the courts should preserve the right of 'fair comment' undiminished and unimpaired.

In *Slim and Others v The Daily Telegraph Ltd and Others* [1968] 2 QB 157 at p 170 Lord Denning MR said that:

> the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements.

In para 151 of the *Report of the Committee on Defamation* (1975) (Cmnd 5909) under the chairmanship of the late Faulks J it is stated:

> The very wide breadth of the main criterion for the defence of fair comment (could an honest albeit prejudiced person have expressed such an opinion) has stood for over a century. It is generally regarded as a bulwark of free speech.

[86] The *Telnikoff* case is also important for the proposition that the task of determining what is fact and what is comment is not an easy one. At p 827 of the judgment the learned judge (Lord Ackner) alluded to this difficulty and said:

> However, the fundamental question which remains is whether the words complained of in that letter were capable of being understood as a statement or statements of fact, since if they were, they were defamatory, there being no attempt to justify them. It is common ground that it is for the judge alone to decide whether the words complained of are capable of being a statement of a fact or facts and whether his ruling is right or wrong is a matter of law for the decision of an appellate tribunal. Drake J decided that the words were not so capable and his decision was upheld by the Court of Appeal. It is not always easy to draw the distinction between an expression of an opinion and an assertion of fact. The very same words may be one or the other according to their context. This point is cogently made in *Winfield and Jolowicz on Tort* 11th Ed, (1979), p 304 where this example is provided:
>
> To say that 'A is a disgrace to human nature' is an allegation of fact, but if the words were 'A murdered his father and is therefore a disgrace to human nature'

the latter—words are plainly a comment on the former,

I do not take it to be disputed that whether the words complained of were reasonably capable of being understood as comment or a statement of fact must depend on a consideration of the whole of the words used, then context and the circumstances of publication. The vital issue in this case is — what is their context? ...

[87] It was argued for the defendant that an honest-minded Malaysian would hold that the plaintiff's use and benefit of Erwan's 20 million Biosis shares; Erwan's Biosis directorship, the plaintiff's sudden acquisition of substantial funds in 2013; the plaintiff's political influence to cause non-MARA persons, Erwan and Izmir (both of whom the plaintiff admits of knowing) to be appointed to the Thrushcross board and to assist 'frontmen' Erwan and Mazrul to push the decision makers to close the property transactions, the impugned paras 4–6 are opinions that an honest-minded Malaysian could hold.

[88] As for the element of public interest, it was submitted that the overpayment or losses by MARA is a matter of public interest. MARA is an agency under the Ministry of Rural and Regional Development. It was established on 1 March 1966 as a statutory body by an Act of Parliament as a result of the first Bumiputera Economic Congress resolution in 1965, MARA is responsible for developing, encouraging, facilitating and fostering economic and social development in the Federation of Malaysia, particularly in the rural areas with funds from the federal government.

[89] As for the issue of malice, it was argued that the plaintiff has failed to prove that the defendant did not genuinely hold the opinion he expressed. The standard of proof required is the same as that of proving an allegation of dishonesty. It is alleged that the plaintiff has not produced any evidence to support the allegation of malice in his evidence-in-chief or called any other evidence to do so. It was argued for the defendant that the suggestion that the defendant has a political agenda to tarnish the plaintiff or that the defendant wants to be the Prime Minster of Malaysia one day or that the defendant wants to be in power one day or the defendant wants to take advantage of the people's anger in connection with the RM2.6 billion scandal or that the defendant has other agenda are not accepted in law to establish malice to defeat the defence of fair comment. The concept of malice in the defence of fair comment is different from the malice in qualified privilege owing to the different purposes of the two defences. Any actuation by spite, animosity, intention to injure, intent to rouse controversy or other motivation, whatever it may be, even if it was the dominant or sole motive does not by itself defeat the defence of fair comment. The only ground to defeat the defence of fair comment is for the plaintiff to prove subjectively that the defendant did not genuinely hold the

opinion he expressed (*Cheng Albert v Tse Wai Chun Paul* [2000] 4 HKC 1 at 13E–15A, 17–18F, 22F–23A); *Branson v Bower* [2001] EWCA Civ 791 at paras 24–28, *Spiller v Joseph* [2010] UKSC 53 at pp 66–67, 105 and 108).

[90] Here, it was emphasised that the defendant has shown that he honestly believes in the statements as shown in his witness statements (paras A24, A25, A26, A27, A28.1, A28.2, A29.1, A29.6, A32.1, A32.2, A32.3 and A33 DW1: 28–37). The defendant said he has reason to believe the plaintiff is involved in the property transactions from various queries made and information received (NOP: 55–56). The defendant said he will continue to publicly highlight the issue of MARA and that the plaintiff and UMNO leaders could and should have done more to recover MARA's money (NOP: 96). The defendant said he is duty bound to bring up the issue of mismanagement of MARA funds of which the plaintiff is duty bound to comment and answer (NOP: 97). The defendant said he has faced and is facing various actions for exposing matters in the public interest for which he runs the risks of losing financially and all that he has. It is illogical for him to suffer these detrimental consequences if the matters exposed are not true or if he did not genuinely believe them to be true.

[91] The next point that was emphasised by the plaintiff is the failure on the part of the defendant to approach the plaintiff to verify. It was argued that such failure on the defendant's part is not malice that defeats the defence of fair comment. In any event, counsel pointed out that it is expressly stated in principle 7 of Lord Nicholls judgment that an approach to the plaintiff is not always necessary (see *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2007] 1 AC 359 at p 389; para 79).

[92] Counsel submitted that the *Reynolds* privilege is not lost if the defendant did not obtain verificadon from the plaintiff where the expected response is a 'denial' (*Jamel* at p 389; paras 83–84 and 141). In this case, the defendant explained that he did not call the plaintiff because he expected the plaintiff to deny (NOP: 67 and 108–109).

[93] As for the suggestion that the defendant acted recklessly, counsel submitted that the defendant did not act recklessly and had conducted his own verification before issuing the press release. It was emphasised that the defendant did not act on the information from the Australian journalist in March 2015 nor on the information by whistie-blowers in June 2015 until he had obtained verification of the information (DW1: 5 para A7); The defendants verification included sending his colleague to Melbourne where he obtained the court transcripts and court documents (DW1: 6). The defendant said he took about three months to double check the information with other sources and official documents for corroboration. The defendant was in constant contact with a few whistie-blowers from within MARA and UMNO

Youth who provided the information (DW1:8 para A10); The defendant obtained official confirmation that the Chairman of MARA, Tan Sri Anuar Musa and a delegation from MARA had gone to Australia to be briefed on the property transactions (DW1: 9 para A11); The defendant conducted his own research and discovered the complicated company structure that was used in the property transactions.

[94] He also conducted research on the rate of return and market prices of the properties (DW1: 9–13 paras A12.1, A12.2, A13.1, A13.2, A14.1–14.4); The defendant checked other facts, events and other sources (see: NOP p 69) The defendant carried out various actions to verify the matter before he published the press release which included obtaining official, ministerial or agency documents (see NOP pp 105–108).

ANALYSIS AND CONCLUSION

[95] The issue here is whether the plaintiff was defamed by the press release on the MARA property purchase scandal that was issued by the defendant on 6 July 2015. The first task at hand is for this court to determine whether the impugned words are capable of bearing a defamatory meaning and if so, whether they are in fact defamatory of the plaintiff (as per para 9 of the statement of claim). As may be gleaned from the various case authorities referred to above, the guiding principles to the determination of the meaning to be ascribed to the impugned words are, inter alia, an interpretation that is reasonable and not strained or perverse or utterly unreasonable. The impugned article has to be read as a whole and anything contained within the article which dilutes of neutralises any defamatory suggestion is to be taken into account as well. Last but not least, an over elaborate analysis is to be avoided.

[96] Following the case of *Chase*, it is now settled that:

(a) words may be capable of meaning the claimant has in fact committed some serious act ('*Chase* level 1 meaning');

(b) aternatively the words may mean that there are reasonable grounds to suspect that the claimant has committed such an act ('*Chase* level 2 meaning'); and

(c) a third possibility is that the words may mean that there are grounds for investigating whether the claimant is responsible for such act ('*Chase* level 3 meaning');

[97] Thus the approach and proof of the defence of justification in respect of each of the different levels of meanings is different:

(a) in a *Chase* level 1 meaning where the allegation is made with the highest

degree of certitude then the imputation of guilt must be defended;

(b) in a *Chase* level 2 meaning where the allegation is 'reasonable grounds to suspect' the Court of Appeal in *Musa King v Telegraph Group Ttd* [2004] EWCA Civ 613 at paras 22–23 held a defendant has to prove the primary facts and matters giving rise to the reasonable grounds of suspicion objectively judged which includes the application of the conduct rule, the repetition rule and several odier principles known as 'the *Musa King* principles'; and

(c) in a *Chase* level 3 meaning — the lesser imputation that there are grounds for investigation — the defendant is entided to succeed upon proving that such grounds exist. The English Court of Appeal in *Jameel*'s case paras 29–30 held that grounds for enquiry/investigation do not have to be shown to be 'objectively reasonable' as the point of the investigation is to discover whether they are so. The *Musa King* principles do not apply to the defence of justification under this *Chase* level 3 meaning, (see *Gadey on Libel and Slander* (12th Ed) para 11.13 pp 407–410).

[98] And so the question is what exactly do the impugned words convey? The impugned words are contained in six paragraphs. Most of these paragraphs have been either proven to be true or admitted to be true by the plaintiff. What really remains to be considered is the *fourth paragraph* in the article and the question is whether it is defamatory because the plaintiff's name appears in it and he has been asked to provide an explanation for the property transactions. It reads as:

> Seperti yang telah dilaporkan minggu lepas, hartanah ini dijual pada harga AUD$23.5 juta seperti rekod di Australia tetapi jumlah yang diluluskan oleh MARA adalah AUDS41.8 juta (bersamaan RM138.6 juta). Ada ketirisan sebanyak RM63 juta *yang perlu dijawab oleh individu-individu yang saya namakan pada hari ini iaitu* Erwan Azizi, Izmir Abdul Hamid, Mazrul Haizad Maarof, Dazma Shah Daud *dan Khairul Azwan Haron yang semuanya adalah sama ada pemegang jawatan Pemuda Umno ataupun individu yang rapat dengan mereka;*

[99] But at the same time, it must be appreciated that the fourth paragraph does not stand on its own and forms part of a narrative wherein in the next paragraph, the defendant has implored that investigation be carried out on those who are involved in the property transactions. The *fifth paragraph* reads as:

> *Siasatan dan tindakan yang diambil ke atas individu-individu yang terbabit di dalam skandal MARA* ini mestilah juga membabitkan mereka yang berada di belakang tabir yang bertindak sebagai pengatur atau broker kepada urusniaga yang merugikan MARA ini; dan

[100] The fourth paragraph and fifth paragraph must also been viewed in

the context of the *sixth paragraph* which reads as:

> Saudara Khairy Jamaluddin *perlu tampil ke hadapan memberi penjelasan bagaimana individu-mdividu yang berkaitan dengan pimpinan Pemuda Umno telah terlibat dan berkait dengan skandal ini.* Maklumat yang diberikan kepada saya menyatakan bahawa mereka ini terlibat sebagai pengatur kepada urusniaga-urusniaga ini dan *berkemungkinan mendapat keuntungan dari urusniaga ini* — maka wajarlah Saudara Khairy Jamaluddin memberi penjelasan yang sebaiknya. (Emphasis added.)

[101] Thus the imperative question is whether the fourth paragraph bears the defamatory meaning that the plaintiff is, inter alia, guilty of corruption or abuse of power as stated in para 9 of the statement of claim. No doubt, the defendant has named the plaintiff as one of those who should come forward and render an explanation for the transactions. But the issue is whether the impugned words convey to the hypothetical reader that the plaintiff is guilty of corruption or abuse of power or whether as contended by the defendant, it merely suggests that there are reasonable grounds for investigations to be carried out and for the plaintiff and the Head of UMNO Youth, Khairy Jamaluddin to come forward and give an explanation on the matter. In this regard, I have given the issue much consideration and thought and the conclusion that I have reached is that the fourth paragraph of the press release/impugned words does not convey any of the meanings as ascribed by the plaintiff in para 9 of the statement of claim.

[102] On the contrary, the lesser meaning or the *Lucas-Box* meaning that was ascribed by the defendant as per paras 6–7 of the defence more readily resonates with the meanings that are to be culled from the impugned words. Taking the press release as a whole, I find that there is no imputation that suggests that the plaintiff is guilty of corruption or abuse of power, rather it suggests that there are reasonable grounds for investigations to be conducted and that the plaintiff, who is politically or commercially connected or affiliated to some of the individuals named in the press release, should come forward and render an explanation as regards the property transactions.

[103] Indeed, to accede to the meanings that are found in para 9 of the statement of claim would be to place a wholly strained and unreasonable interpretation to the impugned words, having regard to the context and all the circumstances attendant upon the issue of the property transactions. I accept that it is embarrassing for the plaintiff to find his name being mentioned in the press release which pertains to a totally unpalatable topic but the reality of it is that the impugned words, when reasonably construed, did not suggest that the plaintiff was guilty of corruption or abuse of power. At best, it only bore the meaning that investigations should be carried out and those in UMNO or UMNO Youth should explain or unravel what really took place with respect to the property transactions.

[104] As such, I am impelled to the view that the impugned words, taken at its highest, had only a *Chase* level 3 meaning and that is the meaning which the defendant has to justify. In so far as justification of the *Chase* level 3 meaning is concerned, the lesser imputation that there are reasonable grounds for investigation or that the plaintiff should come forward and give an explanation, it is my view that based on the evidence that was adduced by the defendant, including but not limited to the substantive and comprehensive answers that he gave during his testimony and cross-examination and the documentary evidence that he produced to back up his theory that there was something rotten about the property transactions, he is entitled to succeed as he has proven on a balance of probabilities that such grounds do exist.

[105] In this regard, it is apposite to mention the English Court of Appeal case of *Jameel* paras 29–30 which had held that grounds for enquiry/investigation do not have to be shown to be 'objectively reasonable' as the point of the investigation is to discover whether they are so. Further, the ten *Musa King* principles do not apply to the defence of justification under a *Chase* level 3 meaning, (see *Gatley on Libel and Slander* (12th Ed) para 11.13 pp 407–410). Interestingly, the *Musa King* case left open the possibility that even in attempting to prove a *Chase* level 2, circumstantial and/or hearsay evidence may be relied upon but the court must decide on the weight to be given to such evidence.

[106] I make reference to this only because of the complaint that was made by counsel for the plaintiff that the defendant had not produced his sources of information, meaning the informants within MARA and/or UMNO who gave him the information as to the identities of those who were involved in the property transactions.

[107] In this regard, one can readily understand the defendant's reluctance to expose those who had given him information in confidence. To expose the informants would have been a betrayal of the confidence. As for the failure to call the Australian solicitor in respect of the Australian court proceedings, the defendant had led evidence to show that the solicitor concerned had forwarded the court transcripts to the defendant with the consent of the liquidator of Trubuilt Projects Private Ltd (in liquidation).

[108] As for the journalist, John Garnaut, it was submitted for the plaintiff that an adverse inference should be drawn because he was not called as a witness. But the issue here is whether despite all the relevant documents before this court, an adverse inference should be drawn against the defendant. I think not. The situation here is that the issue of the irregularities pertaining to the property transactions is most certainly not a figment of the defendant's fertile and vivid imagination. There is most certainly grave cause for concern as to

whether certain parties had abused their positions and used the property transactions to make considerable sums of monies for themselves.

[109] Of course only a thorough investigation, if carried out without fear or favor, will or should at any rate, reveal the identities of the insufferable miscreants behind the property transactions. There is to my mind enough evidence to demonstrate that there is a prima facie case for investigations to be carried out to determine the identities of those who were involved in the property transactions.

[110] As stated earlier, in order to prove a *Chase* level 2 meaning, circumstantial and hearsay evidence may be admitted in order to justify the meanings. In my view, it is all the more the case that in seeking to justify a *Chase* level 3 meaning, the defendant is entitled to rely on circumstantial and hearsay evidence to justify the meaning, which as I have stated earlier has been satisfied on a balance of probabilities. On this point alone, the plaintiff's claim stands to be dismissed. But for completeness, I will also deal with the defence of fair comment.

[111] Here it was contended for the plaintiff that the defendant had failed to prove the defence of fair comment as the impugned words are statement of fact, which the defendant had not proven to be true and that the defendant was actuated by malice. On the issue of fact or comment, it is clear that this is not an easy task. It could be one or the other. But to be fair to the defendant, he implicitly concedes that some of the impugned words are fact and that these have been proven to be true or admitted by the plaintiff, as being true. These have already been identified in the earlier part of this judgment and I will not regurgitate them here.

[112] The difficulty is with the fourth paragraph of the impugned words, which the plaintiff maintains is a statement of fact and the defendant says is a comment or opinion. Whether a set of words constitutes a statement of fact or is a comment or opinion does present difficulty, because depending on the context it could be either a fact or a comment/opinion (see Lord Ackner's judgment in *Telnikoff v Matusevitch* [1991] 4 All ER 817 HL at p 826).

[113] In any event, I am of the view that in the present case, any which way that one looks at the fourth paragraph of the impugned words which reads as:

> Seperti yang telah dilaporkan minggu lepas, hartanah ini dijual pada harga AUD$23.5 juta seperti rekod di Australia tetapi jumlah yang diluluskan oleh MARA adalah AUD$41.8 juta (bersamaan RM138.6 juta). Ada ketirisan sebanyak RM63 juta *yang perlu dijawab oleh individu-individu yang saya namakan pada hari ini iaitu* Erwan Azizi, Izmir Abdul Hamid, Mazrul Haizad Maarof, Dazma Shah Daud *dan Khairul Azwan Haron yang semuanya adalah sama ada pemegang jawatan*

Pemuda Umno ataupun individu yang rapat dengan mereka. (Emphasis added.)

the reasonable conclusion or interpretation is that it is a comment or opinion by the defendant. It is a comment or opinion by the defendant that there are individuals who should come forward and explain the property transactions. It most certainly is not a statement of fact which impugns the conduct of the plaintiff as being guilty of corrupt practice or abuse of power. Next, there is absolutely no doubt that the property transactions involve the public interest.

[114] As I said, this involves defalcation of monies belonging to MARA and this means a defalcation of public funds. The last point is whether the defendant was actuated by malice. Here, I am in no doubt at all that the defendant was actuated by nothing more than a public spirited duty to disclose wrongdoings involving public funds and to be a catalyst for public discussion over these matters so that explanations are forthcoming and investigations may be carried out by those who duty it is to either explain or carry out investigations.

[115] The plaintiff's suggestion that the defendant did all these because he wanted to ride on the wave of public anger over the RM2.6 billion scandal is speculative and coincidental. The plaintiff's other suggestion that the defendant went public with the property transactions because he harbored hopes of becoming Prime Minister of Malaysia is rather far-fetched. In so far as it was suggested that the defendant was reckless because he did not verify with the plaintiff, the position in law is that verification with the plaintiff is not mandatory in all circumstances and situations. It all depends.

[116] Here, immediately after the press release, the plaintiff held his own press conference and denied the allegations. And so, any verification with the plaintiff would have been met with an impenetrable wall of denial. And so, in the present circumstances, it would have been pointless to verify anything with the plaintiff.

[117] Still on the topic of recklessness, I accept that if it is shown that the defendant was indifferent to the truth, then that would be a manifestation of recklessness which would show malice on his part. Here there is nothing of that sort. Instead, I find that this is a case where the defendant has done his own investigations after being tipped off by informants from within MARA and/or UMNO and/or UMNO Youth. As a result, he has gathered much detailed information and documents of and concerning the property transactions. This is most certainly not a case where the defendant was 'shooting from his hip'. Rather, he has painstakingly undertaken a fair amount of research into the topic before going public with the exposé on the property transactions. Such conduct on the defendant's part can hardly be described as reckless. In the

result, the suggestion by the plaintiff that the defendant was reckless or indifferent to the truth is totally misplaced. Before I conclude, it is imperative that I should reiterate and echo the wise words of Lord Ackner in *Telnikoff v Matusevitch* [1991] 4 All ER 817 at p 826 who said that the *raison d'etre* of the defence of fair comment was to preserve 'the right of the citizen honestly to express his genuine opinion on a subject of public interest, however wrong or exaggerated or prejudiced that opinion may be'.

[118] It is also apposite to quote from the decision of the English Court of Appeal in *Lyon and another v The Daily Telegraph, Limited* [1943] KB 746, where Scott LJ said, at p 752:

> the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements.

[119] In the result, based on all the principles of law that are derived from the several legal authorities that were presented to this court, the evidence (both oral and documentary) and the legal submissions (both written and oral), the view I take is that the defendant has established on a balance of probabilities, that the defence of justification based on a *Chase* level 3 meaning of the impugned words and has further established the defence of fair comment in accordance with s 9 of the Defamation Act 1957. As such, the plaintiff's claim for defamation against the defendant is hereby dismissed with costs.

THE OUTCOME

[120] The plaintiff's claim is dismissed with costs. The plaintiff is to pay costs of RM73,000 (subject to 4% allocatur).

Order accordingly.

Claim dismissed with cost of RM73,000.

Reported by Kohila Nesan